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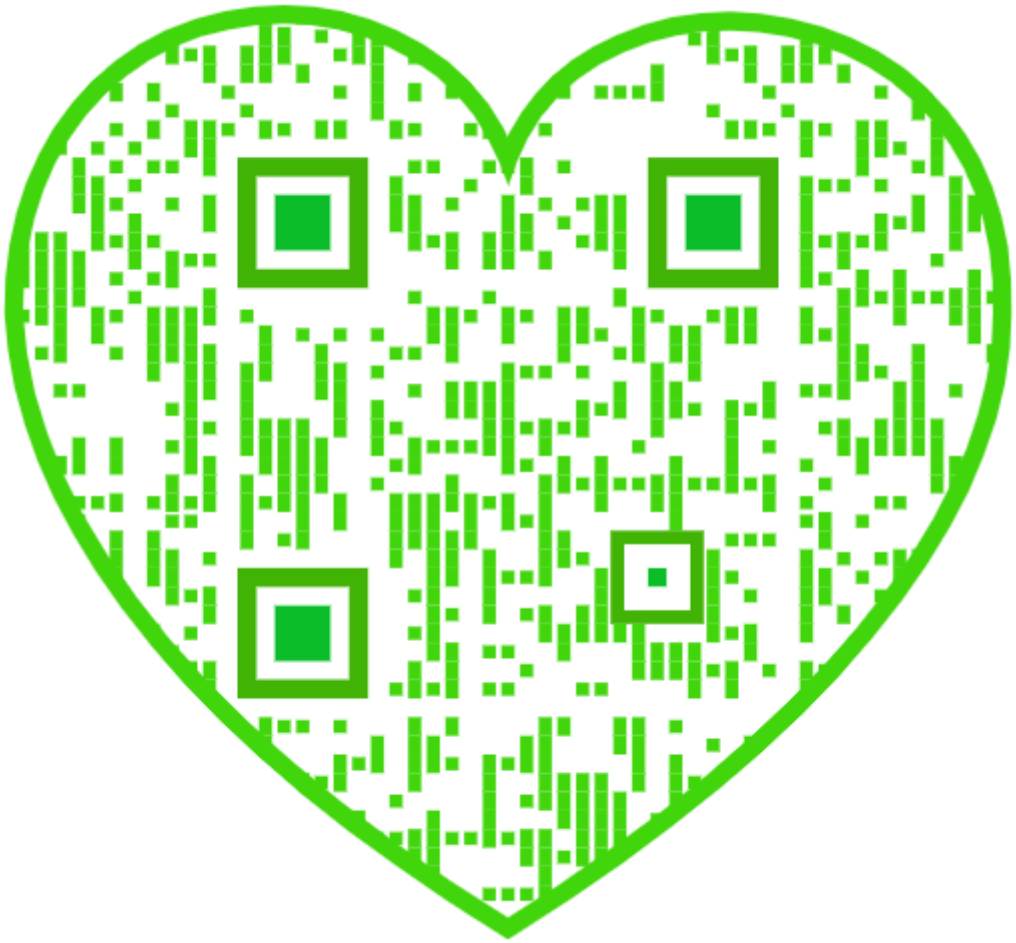

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The New Copyright Law.

CONGRESS has at last enacted a new copyright law, the declared purpose of which is to bring light out of darkness and to make crooked things straight. Perhaps there would have been a greater assurance of this if the measure proposed by the committee had received more attention from the two houses, but they seem to have been satisfied that the committee had done all that was necessary, and so the bill was passed as reported, practically without discussion of its measures. In some respects the new law is more certain than the old one, though in others it is less so. Formerly the procedure for obtaining copyrights was perfectly definite. There were certain things, clearly specified, that were required. These were conditions precedent. The new law seems to change this; certainly it was intended to do so, because the former state of the law in this particular was one of the grievances against it. And yet it may be said that there is a very reasonable doubt as to whether the change is really accomplished. For instance, section 9 provides that "any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act." Does this mean that copyright of a work comes into existence "by publication thereof with the notice of copyright"? If it does, then what is the meaning of the first two lines of section 1 that "any person entitled thereto, *upon complying with the provisions of this act* shall have the exclusive right," etc.? And what are the provisions of the act that must be complied with in order to give the "exclusive right"? The provisions of the act are nearly all permissive in character so far as concerns things to be done by persons seeking copyright. Thus "such person *may* obtain registration of his claim to copyright," but there is no provision that the name or description of any work *shall* be registered. The chief mandatory provisions are that a copyright notice shall be affixed to each copy of a copyrighted work (unless omitted "by accident or mistake"); that two copies of such work shall be deposited in the Library of Congress; and that the work shall be printed from type set within the limits of the United States. Some effort is made to secure the deposit of the copies in the Library of Congress, by a provision for the forfeiture of the copyright if the deposit is not made within three months after a demand by the register of copyrights "upon actual notice." Publishers have never shown any feverish anxiety to get their publications on the shelves of the National Library, and this provision should be very satisfactory to them. In no case will their copyrights be prejudiced by their failure to make the deposit until they have had "actual notice" of their dereliction from the register of copyrights. It is true that they cannot sue for infringement until the deposit has been made, but the right is given to make it at any time before suit is brought. If all publishers should adopt this course, as they would have a right to do under the law, the principal work of the copyright office would probably consist of making these demands. Since registration is not essential to copyright, however, as seems to be the case, it is not easy to understand how the copyright office would get its information as to the works copyrighted "by publication thereof with the notice of copyright" as a basis for a demand for the deposit of copies. The domestic manufacture provision is left in a parlous state. The old law made the copyright dependent on strict compliance with it. Whether the new law can be so interpreted is a matter of very grave doubt to say the least, and depends on whether copyright of a work is obtained "by publication thereof with the notice of copyright" (section 9), or whether copyright is obtained only "upon complying with the provisions of this act." At any rate there is no express provision that any copyright shall fail in case of noncompliance.

Copyright and the Constitution.

BUT the most interesting question of copyright law under any federal statute is how far Congress can go in the premises, and whether it has not already exceeded its constitutional power. The committee fully appreciated this, as their report shows. The question of course is what may properly be considered as the "writings of an author." It cannot be that these words were intended to comprehend all visible expressions of intellectual conceptions, including the products of special gifts of manual dexterity. And if any of these things are not covered by the words "writings of an author," it is clear that resort for protection must be had to the States and not to Congress, which has only such power as is expressly conferred. At the time the Constitution was adopted sculpture, painting, the multiplying process of engraving and the like were perfectly well known, and it is not conceivable that the masters of language who framed the Constitution meant such things as statuary and pictures where they used the words "writings of an author." Besides the plain meaning of the words, a clear indication of the reason for not

including such subjects is that the sculptor and painter could not be considered as needing any such protection. There is no multiplying process by which copies of a statue can be produced. If physical things such as stone or metal worked into the form of any object, animate or inanimate, are to be considered as the "writings" of an author, it would seem to follow that wood or any other material so treated would also be within those words, and that articles of furniture and even houses could be made subjects of copyright. The courts have construed the phrase with great liberality, but there must be some limit to its meaning.

Mechanical Reproduction of Music.

THE chief difficulty that the committee encountered in framing the copyright bill was to reconcile the conflicting claims in regard to musical compositions. There are certain drippings or by-products of such works that have heretofore been open to the public. These came into existence through the ingenuity of the inventors of the machines for reproducing sound, and the composers claimed a profit from that source. The same claim had been denied in Europe, but the committee made concessions to both interests. The new law extends copyright protection to the mechanical reproduction of music to the ear, but provides that if the composer permits one person to make disks, perforated rolls, and the like, all others shall have the same right on certain terms. This was all the time regarded as a fair compromise of the matter, but considerable doubt was felt as to whether Congress had the power to confer any right except an exclusive one. The contention that the provision for a compulsory license was giving to one what belonged to another was not worthy of serious consideration, because a new right was being created and Congress, if it had power to give it at all, could unquestionably do so subject to conditions. As to the other matter, the power to grant an "exclusive" right doubtless included the power to grant a qualified or partial right, but however this may be, the exclusive right was in fact granted. The composer is not obliged to give any one the privilege of reproducing his music by mechanical means, but if he accords it to one, he must deal in the same way with all. It is optional with him whether he will retain the "exclusive" right or permit others to participate in his privilege.

The Resignation of District Attorney Kealing.

IT is probably an incurable predisposition toward hysteria that a certain portion of the lay press exhibits whenever it is called upon to consider any question of legal morality or ethics. The usual amount of hysterical comment has recently been evoked by the action of United States District Attorney Joseph B. Kealing, of Indiana, in resigning his office rather than assist the efforts of the Department of Justice to procure the removal of the proprietors of the Indianapolis *News* from Indiana to the District of Columbia, there to answer indictments for criminal libel found in that District. The grounds of Mr. Kealing's conscientious scruples are thus stated by him in the course of his letter to the Attorney-General at Washington:

"In this case I have made a careful investigation of the law applicable thereto. As to the guilt or innocence of the defendants on the question of libel, I do not attempt to say. If guilty, they should be prosecuted, but properly indicted and prosecuted in the right place, namely, at their homes. It is only with the question of removal that I have to do. I am not in accord with the government in its attempt to put a strained construction on the law to drag the defendants from their homes to the seat of the government to be tried and punished, while there is a good and sufficient law in this jurisdiction, in the State court. I believe the principle involved is dangerous, striking at the very foundation of our form of government. I cannot, therefore, honestly and conscientiously insist to the court that such is the law, or that such construction should be put on it. Not being able to do this, I do not feel that I can, in justice to my office, continue to hold it and decline to assist."

This stand of the district attorney has been taken by many of the newspapers of the day to indicate a sense of justice and a devotion to the principles of abstract right foreign to lawyers as a class, and to place Mr. Kealing on a pinnacle of superiority to his professional brethren, most of whom are assumed to stand ready to advocate any course of procedure on receipt of sufficient pecuniary compensation.

But there is another side to the matter. What is the duty of a public prosecutor? It is certainly not to exercise the functions of judge and jury. He is the representative of the people, and his duty, as held in case after case, is fairly and fully to lay before the triers of fact and law every pertinent matter and circumstance known to him, and then to abide by their determination. It has been held from time immemorial that the court itself is bound to see affirmatively that no injustice is done to the defendant by any act or contention of the prosecutor.

The governing principle is quite analogous to that involved in the case of an attorney who defends an accused person, though believing him to be guilty. Newspaper moralists always regard such an attorney as himself committing a most heinous offense; but the contrary is so uniformly held by writers on legal ethics and so well settled by reason and by precedents running back to Courvoisier's case and beyond, that serious argument on the subject would be trite and banal.

In discussing the contention that a State's attorney is under a moral duty to enter a *nolle prosequi* whenever he is satisfied that a prisoner is innocent of the charge preferred against him, Dr. Warvelle says: "Nothing could be more pernicious or misleading. The prosecutor is under a legal as well as a moral duty to perform the functions of his office, and he commits a gross breach of his trust if he assumes to use the opportunities of his office to prevent accused persons from being tried. What his belief may be is wholly immaterial, and while it is true that he may, under certain circumstances, enter a *nolle pros.*, yet this is done, not because of his belief in the innocence of the accused, but as a measure of public policy and for the purpose of saving the public money in cases where it becomes evident that the accused cannot be convicted. In such a proceeding the guilt or innocence of the prisoner is immaterial."

Of course, Mr. Kealing had a perfect legal right to resign his office; and since he did resign, he is not chargeable with using his office to prevent trial, or removal for trial, or for any improper purpose whatever, and his motives are not to be impugned; but it would seem that he labored under a misconception of his obligations, and that he would have better fulfilled his duties if he had retained his office, presented fairly the question of removal of the defendants, and left it to the court to determine the law of the case.

Negligence of Servant Temporarily Transferred to Another.

IN a recent case the federal Supreme Court gives us an admirable discussion of the problem, elementary but none too well settled, whether the general or the temporary master is liable for the negligence of a servant temporarily transferred to another. *Standard Oil Co.* v. *Anderson,* 29 Sup. Ct. Rep. 252. The plaintiff in the case was employed by a stevedore engaged in loading a vessel with oil at the defendant's dock. The cases of oil were transferred from the dock to the vessel by means of a winch and drum, with the usual outfit of tackle, guy rope, and hoisting rope, the property of the defendant. The winchman in charge of the apparatus, by whose negligence the injury occurred, was in the general employ of the defendant company, to which for his services the stevedore paid a fixed price. The cases of oil swung upon the crane were brought over the hatch, and at a signal given by one of the stevedore's men stationed on deck were lowered by the winchman through the hatch into the hold of the ship. On one occasion when a draught of cases of oil was suspended over the hatch, the winchman lowered it suddenly into the hold without waiting for the signal. The plaintiff, who was in the hold receiving and packing the cases, was, without negligence on his part, struck by the cases of oil and injured. He brought an action against the defendant company to recover for the injuries thus inflicted. Of course, the defendant could only be liable if the winchman in the performance of his duties in loading the oil was its servant, not the servant of the stevedore. Two cases in the Circuit Court of Appeals on very similar facts had reached exactly opposite conclusions, and so the matter came for final decision to the Supreme Court.

A, having certain work to be done, may decide to do it himself, with workmen furnished by B, who places them under A's entire control, so that A becomes *pro hac vice* their master; or A may employ B to do the entire work under B's sole direction with servants of B's own selection. "In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed — a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking." After examining several cases and citing a number of others, the court declares that the power of substitution or discharge, the payment of wages and other circumstances frequently made the basis of decision "are not the ultimate facts but only those more or less useful in determining whose is the work and whose is the power of control." In the case before the court, the winchman remained in the general employ of the defendant, who selected him, paid his wages, and had power to discharge him. To make him another's servant, it must appear that his relation to the defendant had been for a time suspended and a like new relation with another substituted. But nothing of the sort appeared. Defendant, at an agreed price, furnished the work of its own apparatus and its own workman to the stevedore. The company was therefore, under the facts, held liable.

At first sight the decision seems opposed to the well-known case of Murray *v.* Currie, L. R. 6 C. P. 24; but in that case the stevedore selected from among the sailors furnished to him, at his own discretion, one to operate the winch of which he was in entire control.

Lawyers and the Cabinet.

OF the nine members of President Taft's cabinet five are lawyers. These five gentlemen, each one of whom has gained a national reputation in his chosen calling, are Philander C. Knox, Secretary of State; Jacob M. Dickinson, Secretary of War; George W. Wickersham, Attorney-General; Richard A. Ballinger, Secretary of the Interior, and Charles Nagel, Secretary of Commerce and Labor. Mr. Knox is too well known as Attorney-General under President Roosevelt, and as perhaps the most eminent lawyer in the United States Senate since the retirement of Senator Spooner, to require further comment. Mr. Dickinson is the president of the American Bar Association and acquired international fame as counsel for the government in the Alaskan boundary dispute. Mr. Wickersham is an authority on commercial law, and has been attorney for some of the largest corporations in the country. Mr. Ballinger is an ex-judge of the State of Washington, and is a specialist in admiralty and maritime law. Mr. Nagel is a professor in the St. Louis Law School and a noted political economist. Such is the majority of the official family which Mr. Taft, himself a distinguished lawyer and judge, has gathered about him. It cannot be gainsaid that such a situation as this, whether or not it is without precedent in the history of the nation, gives the legal fraternity just cause for something very akin to bigheadedness. Our national government is composed of three branches, the executive, the legislative, and the judicial. The last-named branch is, of course, one exclusively given over to lawyers. In the national legislature, the lawyers constitute, and always have constituted, a large majority of the representatives in both houses. If, then, lawyers are placed in control of the executive department also, our government comes pretty near to being one of the people, for the people, and by the lawyers, a condition of affairs which speaks well indeed for the legal profession.

Lawyers and Past Cabinets.

IN point of fact, however, for lawyers to hold the executive reins of the government is not at all unprecedented. Without searching for further instances, it will suffice to refer to the cabinets of Washington and Lincoln, in both of which the lawyers largely predominated. Washington's first cabinet consisted of but four portfolios, the postmaster-general not becoming a cabinet officer until 1829. Thomas Jefferson, Secretary of State, Alexander Hamilton, Secretary of the Treasury, and Edmund Randolph, Attorney-General, were all lawyers. The fourth member of the cabinet was Gen. Henry Knox, Secretary of War and the Navy. Lincoln's first cabinet

had seven members, of whom five were lawyers. With William H. Seward as Secretary of State, Salmon P. Chase as Secretary of the Treasury, Gideon Welles as Secretary of the Navy, Edward Bates as Attorney-General, and Montgomery Blair, who was counsel for the plaintiff in the Dred Scott case, as Postmaster-General, the profession was well represented. The remaining members of the Lincoln cabinet were Simon Cameron, Secretary of War, and Caleb B. Smith, Secretary of the Interior. It is doubtful, indeed, if a cabinet was ever constructed that did not contain some illustrious lawyers, in addition to the Attorney-General, who is of course presumptively learned in the law. For instance, in McKinley's first cabinet, the lawyers were outnumbered five to three, but these three were John Sherman, John D. Long, and Judge Joseph McKenna, a trio of statesmen whose influence on the administration was most potential, and whose names will not be forgotten for many generations to come.

A Neglected Cause of Action.

CONSIDERING the vast number of times that visitations of Divine wrath have been invoked, from the days of the Pharaoh who knew not Joseph down to now, it seems passing strange that nowhere in the law reports is there to be found (or if there is, we haven't found it) a case in which a preacher was sued for damages by a person who had been smitten at his behest. Some years ago it was reported in the newspapers that a Pennsylvania brewer had brought an action against the Rev. E. E. Dixon of Monroe county, Pa., for causing his brewery to be struck by lightning, but nothing further came of it apparently. In that case the man of God not only cried aloud for the lightning but plumed himself considerably over his success in delivering the goods.

Quite recently two other similar instances have been chronicled in the press. In one of the western States a superheated evangelist becoming disgusted with the paucity of the harvest in the little vineyard wherein he was laboring, besought the Almighty to send a great wind and blow the abominable place off the map. Lo and behold, a few days thereafter a tornado came roaring across the plain, ripped that ill-starred community up by the roots, and spread it thinly over a neighboring county.

The very latest instance is reported from Oklahoma where the Rev. Charles Ford, a "holiness" preacher, is said to have called down a plague on the town of Bokhoma in the shape of a six-months' drought. The Rev. Ford, who appears to have an unusually strong "pull," employed this summary process to collect from the Frisco Lumber Company a sum of money he claimed to be due him for services rendered in their mill — he being compelled to eke out thus the small stipend earned in his clerical capacity. When the lumber company hardened its heart and refused to give down, Mr. Ford announced his intention of petitioning the Lord to avenge his great wrong by withdrawing rain from that vicinity, and on the following Sunday he sent up from his pulpit one of the most effective prayers since the time of Elijah (see 1 Kings 18). Within three months the Frisco Lumber Company had to shut down. Then, just to show what he could do, he loosened up and allowed enough rain to fall to run the mills for eight days, after which he shut off the supply for another three months. When on March 13 he finally raised the embargo — having presumably collected from the lumber company — the rain immediately descended in torrents for six consecutive hours. So runs the tale.

Now, clearly there is a good and valid cause of action against the preacher in all such cases. Why is it that nobody sues? The defendant would certainly not be allowed to set up that the damage was caused by an "act of God," for that defense is available in law only where the act is one "which no reasonable man could possibly anticipate" — there must be an entire absence of complicity on the part of the defendant. Where the preacher actively and intentionally instigates the wrath of Jehovah, and sets in motion the forces that work the scathe, he would seem to be liable, both civilly and criminally, to exactly the same extent as if he had brought about the consequences through the instrumentality of his own hands rather than through a divine agency. In view of the fact that the Christian religion is held to be part of the law of the land (see *Holy Trinity Ch.* v. *U. S.*, 143 U. S. 457) and that one of the basic doctrines of that religion is the efficacy of prayer, one would imagine that a skilful pleader could place the reverend gentleman between the horns of a rather serious dilemma.

The Changed Attitude of the Supreme Court towards State Legislation.

THE decisions of the Supreme Court of the United States continue to exhibit evidences of what we have ventured to characterize as a new sense of respect toward and reluctance to disturb acts of State legislation. Of course the principles cited and applied are the same and derived from the same cases, but the spirit in which they are invoked shows that the court is viewing matters from a somewhat different angle of vision; a viewpoint from which had legislation been regarded a decade or two ago, a number of acts would now have been in effect which have been stricken from the statute books by the actions of State courts trying to interpret the guaranties of their own and the National Constitution in the spirit of the final guardian of that document. Or perhaps the state courts were but working under the influence of the same time-spirit that controlled the Supreme Court. For after all every court is but the child of its own age, and sooner or later must reflect in its decisions a changed attitude of the public mind on those great questions which, while not themselves in the domain of law, yet underlie and determine that vast department of human thought which is the law.

In *McLean* v. *Arkansas,* 29 S. C. 206, a decision of the Arkansas Supreme Court upholding the validity of an act requiring miners in mines wherein more than ten men are employed, to be paid according to the weight or quantity of coal before it is screened (*McLean* v. *State,* 81 Ark. 304, 11 Ann. Cas. 72), the act is sustained against two attacks founded on the Fourteenth Amendment; that it is an invasion of liberty of contract, and that it is founded upon unjust discrimination, being applicable only to mines employing more than ten men. After laying down the principles that for a number of years have controlled freedom of contract and the exercise of the police power (that freedom of contract is not un-

limited; that it may be restrained in the exercise of the police power; that an act passed in the exercise of that power must be sustained unless it is arbitrary and has no just relation to the protection of the public), it is observed that a number of legislatures have deemed statutes similar to the one in question necessary in the public interest. Several State decisions holding such laws invalid are then referred to, but the court says: "We are not disposed to discuss these State cases. It is enough for our present purpose that the legislative bodies of the States referred to, in the exercise of the right of judgment conferred upon them, have deemed such laws to be necessary." The state of facts shown by the investigations of the Congressional Industrial Commission, authorized in 1898, is examined, and it is observed: "We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of the various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the State. . . . It is not for us to say whether these [conditions claimed to establish the necessity of the law] are the actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to judge and act for itself in the exercise of its lawful power to pass remedial legislation."

The contention that the act is discriminatory and denies the equal protection of the laws is met by showing that there is no discrimination, since the act applies to all mines employing over ten men, and "is presumed to practically regulate the industry when conducted on any considerable scale," and "we cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative stage."

The Conviction of Fischer-Hansen.

THERE is said to be more rejoicing on earth over one preacher who elopes with somebody else's wife than over ninety and nine sinners on the mourner's bench. A close second as a joy producer is a lawyer caught in the toils of the law, and consequently there is a stimulus for many a greasy chuckle in the recent conviction of Carl Fischer-Hansen, the "lawyer-philanthropist" of New York city, for attempted bribery of a witness. Six months ago Fischer-Hansen was regarded — by those, at least, who knew him by reputation only — as one of the coming lawyers of New York. He had ability, was married to the daughter of a millionaire, and by reason of his readiness to volunteer his services gratis to persons accused of crime was frequently acclaimed by the newspapers as a philanthropist. His troubles began when he took charge of a lawsuit for one Tony Macaloose against a wealthy Philadelphian named O'Brien. The case was compromised, and it was alleged that O'Brien paid $25,000 to avoid a scandal. Shortly thereafter Fischer-Hansen was indicted for extortion on the strength of testimony given by Macaloose, but when the case came to trial the Italian told a different story and the lawyer was acquitted. Somehow District Attorney Jerome learned that Macaloose had been bribed, and Fischer-Hansen was again arrested, finally pleaded guilty to attempted bribery, and was sentenced to serve a year in Sing Sing.

The case contains texts for many fine sermons, but what's the use of moralizing or protesting that the rest of us lawyers are very fine fellows indeed and would rather die than bribe a witness? Most of us do not need to bribe witnesses and Fischer-Hansen did need to; and, given his inherited qualities as modified by all his previous environments, it was a mathematical certainty that he would do exactly what he did. Any "free-willer" will tell you this is arrant nonsense, but to a mind unskilled in casuistry it looks very much like a case of $a + b = c$. We do not wish to be understood as advocating the practice of bribery by our readers or as disapproving the punishment that has been meted out to Fischer-Hansen. He seems to have been a sad rascal and probably did not get all that he deserved. But, as our old friend Hamlet so justly observes: "Use every man after his desert, and who should 'scape whipping?"

The Deadly Parallel and Hannis Taylor.

NO law book that has recently come from the press has been reviewed more favorably by the legal journals — among them LAW NOTES — than Dr. Hannis Taylor's "Science of Jurisprudence." But the laurels brought him by this work are now fading apace. The first frost came when Prof. Henry Goudy, of All Souls' College, Oxford, in an article published in the *Juridical Review* for January denounced Dr. Taylor's chapter on the external history of Roman Law as "a gross plagiarism," charging that he had "lifted" the greater part of the chapter from other works, especially Muirhead's Historical Introduction to the Private Law of Rome, Ledlie's translation of Sohm's Institutes of Roman Law, and Bryce's Studies in History and Jurisprudence.

By a somewhat strange coincidence an American scholar, Dean Roscoe Pound, of the Northwestern University Law School, had, without knowledge of Professor Goudy's discovery, subjected the portion of Dr. Taylor's work devoted to analytical jurisprudence to a careful scrutiny and had arrived at the same conclusion regarding its originality. In the *Illinois Law Review* for March he publishes the result of his investigation, and it is hardly probable that Dr. Taylor has derived any great amount of satisfaction from its perusal. In parallel columns Dean Pound sets out extracts from Dr. Taylor's book and from Holland's Elements of Jurisprudence and Howe's Studies in the Civil Law, which make it impossible to escape the conclusion that Dr. Taylor has been "caught with the goods on him."

In a long letter to the *London Times* Dr. Taylor asserted that "Professor Goudy's passionate, prejudiced mind is incapable of the critical function, because he attempted to defame a book he admits he never read, and because in denouncing as an imposture the only chapter he has read he carefully concealed from his readers the one great subject-matter on which its merits really depend." Replying to this Professor Goudy disclaimed any jealousy of American writers and stated that after a careful examination of the whole book he found throughout "exactly the same methods of plagiarism that I exposed in his chapter on Roman Law." He also employed the deadly parallel with telling effect.

It cannot well be questioned that a very strong case has been made out against Dr. Taylor. Unless he can establish the propriety of borrowing without citation or quotation marks from the writings of others, piecing the excerpts together, and offering the product to the public as an original work, he will find some difficulty in justifying himself in the eyes of the legal profession. No wonder we all thought it a mighty fine book.

Hains and the Unwritten Law.

IN its issue for March 17 the New York *Sun* said editorially:

"In an article on the acquittal of Thornton Hains, printed on Friday last, *The Sun* quoted certain remarks on the written and 'unwritten' law attributed to him in LAW NOTES for March. Our comment was based on the language quoted. In justice to Mr. Hains it is proper to say that he asks *The Sun* to deny the utterances in question, and informs us that it is falsely attributed to him."

The language attributed to Mr. Hains in the editorial referred to was quoted from the news columns of the lay press. It was printed in a great number of reputable newspapers immediately after the acquittal of Hains and, so far as we are informed, was allowed to pass unchallenged. Whether or not he actually uttered the words does not seem to be a matter of great importance, for, being an intelligent man, he could not very well have avoided harboring the sentiment, and, at any rate, the comments for which they furnished the text are as true as they ever were.

THE ELEMENT OF BONA FIDES IN THE CRIME OF DISTURBING RELIGIOUS WORSHIP.

THE crime of disturbing meetings assembled for religious worship cannot be defined with even approximate certainty. Much depends upon the occasion and the usages and customs of the worshiping congregation. The offense may be committed by interfering with the progress of the services or detracting from the solemnity of the proceedings. But these are vague generalities, and we have still to determine what acts amount to illegal interference with the proceedings or disturb the solemnity of observances that the law assumes to protect. An act which in the view of some would be highly disturbing might, in the opinion of others, be only an emphatic testimonial to the abounding grace of the occasion. Mr. Bishop in his work on Criminal Law (vol. 2, § 309) says: "Even religious meetings have been conducted in ways not solemn. . . . In such a meeting, doubtless a round roar might be sent up, at the proper moment, in praise of the preacher, without rendering him who worshiped in that form liable to be indicted for crime. Again, among one class of religionists a solemn Amen would be permissible, where among another class it would not be."

The particular stage of a meeting at which the alleged disturbance occurs might easily have an important bearing on the guilt of the offender. A piercing scream at the very beginning of a service before the meeting gets "warmed up" would doubtless be very disturbing to the congregation, while the same exclamation at the close of a powerful discourse, "comforting to the saints and searching to the sinners," and while the latter are being exhorted to turn from their evil ways while yet they may, might be perfectly appropriate and offensive to nobody. In many churches it is deemed a mark of piety to emit such religious applause as "Praise the Lord" and the like, or to exclaim "God grant it" or groan with pleasure when the pastor makes a particularly neat touch in a prayer.

The key to most of the cases dealing with this indefinable crime is the *bona fides* of the alleged offender; and the one best defense to a charge of disturbing religious worship is that the accused was acting in good faith. He can usually establish his innocence if he can show that his acts were the result of genuine religious fervor, or, if they do not partake of the nature of religious enthusiasm, that his conduct was actuated by an honest purpose and was within what he conceived to be his rights.

State v. *Linkshaw,* 69 N. C. 204, is a good example of the innocent disturbance of religious worship. It appeared in that case that the defendant was a member of the complaining congregation and a man of exemplary deportment. His one fault was that he insisted on taking part in the singing of the hymns. He sung in such a way that his voice was heard at the end of each verse after all the other singers had ceased. The disturbance occasioned thereby was decided and serious, the effect being to make the irreligious and frivolous portion of the congregation laugh, while the serious and devout grew indignant and angry. The defendant had refused to stop his singing when expostulated with by the church authorities, so he was indicted. On the trial a witness being asked to describe the defendant's singing imitated it by singing a verse in the voice and manner of the defendant, which "produced a burst of prolonged and irresistible laughter convulsing alike the spectators, the bar, the jury, and the court." It was not contended by the State, however, that the defendant had any intention of disturbing the congregation, but on the contrary it was admitted that he was conscientiously taking part in the religious services. It was held that he might be a proper subject for the discipline of the church but was not indictable.

A choir which, in disobedience to an order of the pastor that there shall be no singing on a certain night, takes possession of the seats of the choir and insists on singing, and does so in an orderly manner, is not guilty of the crime of disturbing a religious meeting. *Com.* v. *McDale,* 2 Pa. Dist. 370.

Exclamations and noises although similar in sound to a genuine religious demonstration are punishable, if it appears that they are made in levity. Persons groaning aloud, through improper motives, during the prayer at the close of the sermon, and thereby causing the minister to be disturbed, are guilty of the offense of disturbing public worship. *Friedlander* v. *State,* 7 Tex. App. 205. To remark during a prayer, with intent to deride it, "Pray louder, peradventure your God is asleep or has gone on a journey," constitutes the offense, when the congregation is disturbed. *Chisholm* v. *State,* (Tex. Cr. App. 1894) 24 S. W. Rep. 646.

A case in which the court was but little impressed with the genuineness of enthusiastic approval of a sermon was

Shirley v. *State,* 1 Ga. App. 143, where the facts were stated by Judge Powell as follows: "The defendant was indicted and convicted in Rabun Superior Court for the offense of disturbing public worship. It seems, from the evidence set out in the record, that services were held at 'Old Tiger Church,' in that county, on Christmas day, and that the defendant, although he was described by the pastor of the church as a 'scoffer at religion,' attended. The indictment, in substance, alleges, among other things, that the defendant carried to the church a considerable quantity of intoxicating liquors, both within and without his person; and in corroboration of this evidence disclosed that he appeared to be intoxicated, and that one of the brethren thought he smelled whiskey on him. The defendant also stated to the preacher that he had just drunk some ginger ale, but as to what particular kind of ginger ale is brewed about Christmas times in the mountains of North Georgia, in which Rabun county is situated, the record is silent. However, it seems to have stimulated the defendant's generosity, for the preacher testified: 'Just before the services began, he took me out near the schoolhouse, where his fine Berkshire sow was lying in her bed, and showed her to me, and told me that he would give me one of her pigs.' Upon going into the church the defendant took his seat near the entrance, but as the services progressed he kept moving nearer and nearer to the pulpit. When the singing began he joined in, and, as Longstreet in his 'Georgia Scenes' says of the singing of Ned Brace on his famous visit to Savannah, 'he sang very loud, and, apparently, purposely to make a discord.' As the preacher proceeded with his sermon the defendant began to express his approbation, interrupting him several times to say, 'Well, that is the best sermon I ever heard you preach.' Finally his zeal became so great that he went up into the pulpit and took hold of the preacher's arm and continued to compliment the sermon. This naturally created some disturbance; indeed the preacher stated in his testimony: 'I was so much disturbed by him that I thought I would have to stop preaching, but I knew defendant was a scoffer at religion, and I determined that the devil, through him, should not break up the meeting, and so I kept on preaching notwithstanding his interruption.'" The court declined to relieve the defendant of the effects of his untimely conviviality.

Disturbances in church growing out of the assertion of some supposed right do not usually constitute the crime of disturbing religious worship. Thus it has been held that the majority faction of a negro church which has expelled the minority faction from membership is not guilty of the crime in remonstrating against the use of the church by the minority found conducting services there, and that the majority has the right to use such means, not amounting to needless force, as may be necessary to prevent it. *Morris* v. *State,* 84 Ala. 457. A preacher representing one of two discordant factions in a negro church, who goes into the pulpit on the occasion of the holding of divine services and proceeds to preach to the congregation assembled, thereby preventing his contesting brother from ministering to the spiritual needs of the flock at the time and place in question, is not guilty of disturbing a religious meeting. *Woodall* v. *State,* (Ga. App. 1908) 62 S. E. 485. In a somewhat similar case it appeared that each of two factions of religious worshipers claimed the same church building and had posted notices forbidding the other to enter the premises. On a certain Sunday one faction took possession of the church and when the other faction arrived and desired to conduct religious services the faction in possession prevented them from entering the church. On appeal from the conviction of a member of the faction in possession of the church for disturbing a religious congregation by this conduct, it was held error to have excluded testimony for the defendant tending to show that he had title to the premises or acted under a *bona fide* belief that he had title. *State* v. *Jacobs,* 103 N. C. 397. Where a steward of a colored church delegated by the church officials to notify the minister to stop preaching pending the investigation of charges imputing to him improper intimacy with a female member of his congregation, went to the church in which the minister was speaking to the assembled congregation, and approaching the pulpit, said in a mild manner, "Brother Shanks, you will have to quit preaching until charges against you are investigated by the elder," it was held that the steward was not guilty of the offense of disturbing the congregation because of the absence of a wrongful intent to cause a disturbance. *Richardson* v. *State,* 5 Tex. App. 470.

The disturber of a worshiping congregation may proceed so far beyond what his actual rights are that the element of good faith in his conduct will not protect him. Where the brethren of a negro congregation finding themselves unable to dwell together in unity had separated into two factions and a member of a committee appointed by his faction to notify the preacher of the opposing faction not to preach on a certain Sunday not only delivered the notice, but "proceeded further by snatching the would-be preacher from the pulpit and telling him that if he attempted to preach he (the defendant) would give him the worst whipping a man ever got," it was held that this action exceeded the member's instruction and warranted a conviction for disturbing the congregation. *Coleman* v. *State,* (Ga. App. 1908) 62 S. E. Rep. 487. A father who goes to a church in search of his minor daughter and upon seeing her kneeling in prayer goes to her, raises her from her knees, and takes her away by force and violence is guilty of disturbing religious worship. *Com.* v. *Ligman,* 3 Pa. Law J. Rep. 252.

A member of a congregation may doubtless air his grievances in church if he does so in good faith and with reasonable self-control, but if he too far transcends the bounds of temperate speech he will be guilty of disturbing the assembled congregation. A member has been found guilty who, having obtained from the preacher leave to speak, arose and said: "I neither rise to preach, pray, or sing, but I want to talk to the church. I have meditated, thought, and prayed to know what I ought to do. I demand my letter. I cannot live in the church with liars, thieves, rogues, and murderers." *Lancaster* v. *State,* 53 Ala. 398. Where a person who had been expelled from the communion of the church several weeks before rose up in the church, just before or soon after the beginning of the services, and began to speak on matters connected with his expulsion, and upon being told by the minister that he could not be permitted to speak and must stop, declared that he would be heard, and persisted in speaking until some of the members present put him out of the house, and he immediately re-entered and resumed his

speaking in disregard of the repeated commands and remonstrances of the minister, and so interrupted the exercises that the meeting broke up and the congregation went home, it was held that the offense of disturbing a religious meeting was committed, the court saying: "No one has a right to interfere with the religious devotions of others, by making known his own grievances, real or fancied, in so boisterous a manner as to disturb and finally break up the meeting altogether." *State* v. *Ramsay,* 78 N. C. 448. In *Wall* v. *Lee,* 34 N. Y. 141, a person who in a loud voice at the close of the sermon interrogated the pastor in regard to a reproving allusion the pastor had made in his sermon in regard to a dance in the vicinity, and declared that the pastor's remarks were false, was convicted of disturbing divine worship.

J. M. Greenfield, Jr.

MISSOURI RATE LAWS DECLARED CONFISCATORY.

In the United States District Court at Kansas City Judge McPherson has handed down a decision declaring unconstitutional and confiscatory the Missouri statutes fixing on many lines a passenger rate of two cents, and providing for a maximum freight rate. The laws have been tested by actual operation, and in the light of the figures and statistics accumulated during this period, the result that the law is confiscatory is reached by Judge McPherson. He declares that the roads are entitled to a return of six per cent. per annum over and above expenses, referring to the recent decision of the Supreme Court in the New York Consolidated Gas Company case. The question whether that income is received is to be decided by a consideration of the returns from business done in Missouri, less expenses properly charged against the same. The theory upon which expenses are to be divided between interstate and intrastate or local business is that they are chargeable in proportion to the revenue derived from the two classes of traffic. On this point the court says:

"The valuation of the roads has been fixed by the court as shown by the findings of fact. The entire State and interstate earnings of each of the roads within the State are known and fixed to a certainty. The expenses are known and fixed. To apportion these expenses must be done according to one of the two theories, and the correct theory is that according to revenue. One theory or other must be applied to both freight and passenger expenses, and the court should not adopt the one theory as to part, and the other theory as to another. The one theory is helpful to the one side, and the other theory helpful to the other side — the one theory to the one side in freight, and the other theory to the other side in passenger. But an arbitrary splitting of theories is illogical and unfair, and cannot be recognized. The court has adopted the revenue theory because a great number of the best railroad experts of the country, against a very limited number to the contrary, have so testified. Every court that has ever had this question before it, in so far as I am advised by the briefs of counsel and my own independent investigation, has so held."

Applying these principles to the passenger rate laws it is observed:

"The passenger earnings under the two-cent fare law of 1907, allowing nothing for extra cost over interstate business, give no return whatever to the Rock Island, St. Louis and Hannibal, Kansas City, Clinton and Springfield, and the Great Western. The other companies will have the following: The St. Louis and San Francisco between three and four per cent.; the Santa Fé between four and five per cent.; the Kansas City Southern a small fraction over two per cent.; the Missouri, Kansas and Texas between two and three per cent.; the Burlington between three and four per cent. But all this is arrived at by allowing no extra cost of service. But to add the extra cost for freight and passenger, there are no earnings over expenses. This is confiscation under the Constitution."

Judge McPherson's personal opinion as to what would be a fair rate is thus indicated: "It being a legislative act, and not a judicial one, this court cannot fix rates. If it could, two and one-half cent passenger rates would be fixed for the stronger roads, and three for the others. But that is for the legislature, acting itself with experts such as the State employed in these cases, or through a commission with like assistance."

Naturally enough the decision strikes the parties litigant rather differently. To Mr. Hagerman, counsel for the railroads, it is wise and satisfactory. "Judge McPherson," he declares, "proceeded with unusual care and caution, and at great personal sacrifice to himself heard the testimony orally. He has laid down in simple words certain rules, by the use of which any legislature seeking to pass a rate law, or any railroad desiring to contest one, can readily determine whether it is confiscatory. These rules are: Ascertain the value of the entire railroad property in the State; of such value, assign to the traffic to which the rate in question applies such proportion as the revenue from such traffic bears to the entire State revenue; upon this assignable value there must be an annual return of at least six per cent.; expenses as between State and interstate business must be divided upon a revenue basis, and have added thereto the extra cost of doing State business over interstate business."

Governor Hadley, who, as attorney-general of Missouri, conducted the earlier stages of the litigation, has this to say:

"While the decision is simply the opinion of one judge, it must be accepted as the law until the case is submitted to the Supreme Court of the United States. That I think the decision is wrong, goes without saying. The theory of the railroad experts, that the expenses common to State and interstate traffic should be divided in proportion to the revenue produced by the two classes of traffic, with an added increase of cost for doing State business, seems to me manifestly absurd, as its logical result is that the higher the rates and the greater the revenue produced by the State traffic, the larger would be the amount of expenses assigned to that traffic."

By which it will be seen there are two sides to every question.

HISTRIONICS AND HOMILETICS FOR THE JURY.

Down in Virginia, the counsel for one Hardy, who has been convicted of murder, are seeking a new trial for their client, according to the daily press, on the ground that the jury which convicted him attended a moving picture show in the course of the trial. While the visit to the show was made under the permission of the court, and the jury was properly chaperoned by officers of the court, the counsel are said to urge that the character of some of the pictures was such as to exercise upon the jury an influence prejudicial to their client. The pictures to which exception is taken were two which set forth death scenes, one showing a duel in Normandy, and the other a moonshine tragedy in Kentucky.

Moving pictures have been added so recently to the embarrassments of a complex civilization that the question as to their psychological effect upon the minds of jurymen does not seem to have arisen in the courts before this.

It can be seen readily that in the hands of unscrupulous

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How long they remained there does not appear. For aught that appears in the record, the house may have been crowded. One of the grounds of the motion alleges that there was 'shouting' at the meeting. What influence this shouting and religious excitement may have had upon the minds of the jury does not appear. It does not appear that Mr. Hooten, the prosecutor, was not among those who shouted. The jury seeing this going on, and seeing this prosecutor filled with religious zeal and fervor, may have reasoned in their minds, and doubtless did, that this man, who was the active prosecutor of the defendant, who assisted in the selection of themselves as jurors in the case, and who testified before them as a witness, by his conduct and declaration at the prayer meeting showed that he was a good and upright man, and that such a man would not prosecute the defendant unless he believed him to be guilty. Some of them were perhaps members of his congregation, and looked up to him as their pastor and spiritual guide. We do not say, nor do we intend to intimate, that Mr. Hooten designedly intended his actions to have an undue influence upon the jury; but who can say that they did not have this effect? Suppose that instead of the jury having been taken by the bailiff to the preacher, the bailiff had brought the preacher to the jury room, and he had there addressed them, would any one say that this would not have been such gross misconduct as to require their verdict to be set aside? Suppose, too, that in addition to carrying the preacher to the jury room, the bailiff had carried his congregation, and that these exercises had been held in the jury room, would any one say that their verdict should not be set aside? What difference does it make whether the jury is carried to the preacher and the congregation, or whether the preacher and the congregation are brought to the jury? It is true that the jury say in their affidavits that these things did not influence their minds; but how can they tell — how can any man tell what particular facts and circumstances influence his judgment?"

Where attendance at a theatrical performance is the ground on which the new trial is sought, the courts are unanimous in refusing to grant it. Jones *v.* People, 6 Colo. 452; State *v.* Levy, 9 Idaho 483. And this is so even though the entertainment is a burlesque of judicial proceedings, introducing, among other incidents, one wherein, at the trial of a prisoner charged with stealing a jug of whiskey, the judge and court officers get drunk on the stolen whiskey. Moore *v.* People, 26 Colo. 213.

The Missouri court, with a knowledge evidently sprung from experience, seems inclined to doubt that a rational man can be influenced by an entertainment in the form of a minstrel show, the program of which consisted of comic and sentimental songs, in no way touching on the case, with occasional dances to relieve the tedium. State *v.* Jeffries, 210 Mo. 302. The courts are, however, in the foregoing decisions, equally unanimous in holding it an impropriety, to say the least, to permit the jury to attend theatrical exhibitions.

BASIL JONES.

THE NEW KANSAS CODE OF CIVIL PROCEDURE.

THE Kansas legislature has recently passed a revised code of civil procedure which will doubtless be of interest to the profession throughout the country by reason of some very radical changes in the rules of procedure. The bill was prepared by a committee of the State Bar Association, headed by Mr. Stephen H. Allen, of Topeka, and was recommended for passage at the last annual meeting of the association.

The old code was substantially the Ohio code. The revision does not materially change the manner of commencing an action or the provisional remedies. The following are the principal changes.

The old code classifies actions and restricts the joinder of causes to those falling in one of the seven classes. The new code provides:

"The plaintiff may unite several causes of action in the same petition, whether they be such as have been heretofore denominated legal or equitable, or both. But the causes of action so united must affect all the parties to the action, except in actions to enforce mortgages or other liens."

The old code contained a positive requirement that "where the petition contains more than one cause of action each shall be separately stated and numbered." This is stricken out, and in lieu thereof it is made discretionary with the court to require a separate statement and numbering. The old code makes it a ground of demurrer, "that there is a defect of parties plaintiff or defendant" or "that several causes of action are improperly joined." These grounds are stricken out and such defects may be remedied by motion.

The definition of a set-off is changed to read as follows:

"A set-off can only be pleaded in an action in which a recovery of money is sought, and must be a cause of action for the recovery of money."

To prevent filing sham answers to delay judgments in certain classes of actions the following provision is made:

"In all actions founded on written instruments for the unconditional payment of money, or on a verified account for goods sold and delivered, or a verified claim for the wages of the plaintiff for his personal services, the answer shall be verified by the defendant, his agent, or attorney."

Power is given to the judge at chambers to hear and determine all preliminary questions and to do practically everything except render final judgment. All questions of law arising in a case, whether raised by motion, demurrer, or merely suggested by the pleadings, may be heard and decided in advance of the trial, the ruling of the court being stated in writing and filed as a part of the record.

Causes are triable in ten days after the issues are made up without reference to the commencement of a term of court.

New trials are only to be granted where there has not been a fair trial. Where the application for a new trial is on the ground of the exclusion of evidence, want of fair opportunity to produce evidence, or newly discovered evidence, such evidence must be produced at the hearing of the motion by affidavit, deposition, or oral testimony, and the opposing party may rebut it; and,

"A new trial shall not be granted as to any issues in a case unless on the pleadings and all the evidence offered at the trial and on the motion for a new trial the court shall be of the opinion that the verdict or decision is wrong in whole or in some material part, and the new trial shall be only of the issues as to which the verdict or decision appears to be wrong, when such issues are separable."

A very important change with reference to evidence is as follows:

"Affidavits may also be used on the trial of an action subject to the following conditions: The affidavit shall be filed in the office of the clerk of the court and a copy thereof served on the adverse party at least ten days before the day of trial. If within five days after such service the adverse party gives notice in writing that he desires to cross-examine the witness whose affidavit has been filed, or that he denies the truth of the matter stated in such affidavit, such affidavit shall not be admitted in evidence, but the testimony of the witness must be given orally or by deposition in cases where the witness can be produced or his deposition be procured. If such notice be not given, or the

witness shall have died, the affidavit may be read in evidence at the trial. The court may tax the costs of the attendance or deposition of any witness against a party who needlessly or unreasonably causes such costs."

Exceptions, bills of exceptions, and cases for review are abolished. It is no longer necessary or of any advantage to note an exception to a ruling of the trial court in any form or manner. Appeals to the Supreme Court may be taken in substantially the same cases as heretofore, but the practice is entirely changed. The method of taking an appeal is by notice of appeal from the whole or any designated part of the judgment, served on such of the adverse parties as will be affected by a reversal or modification, and filed in the office of the clerk of the trial court. The adverse party may take a cross appeal in like manner. On filing the notice the clerk of the court is required to forward a certified copy of it and of the judgment appealed from to the clerk of the Supreme Court. The appeal is perfected, however, as soon as the notice is served and filed with the clerk of the trial court. All depositions, documents, or copies thereof, and exhibits of every kind, and all instructions of the court to the jury are required to be filed with the clerk of the trial court and thereupon become parts of the record. Either party may obtain from the official court reporter a certified transcript of the whole or any part of the oral testimony in the case and file the same with the clerk of the trial court, and it thereupon becomes a part of the record, subject to correction by the court on proper application.

Cases in the Supreme Court are to be heard and considered on their merits, wholly without regard to technical errors or exceptions. The case in the Supreme Court is to be heard on an abstract of the record of the trial court, but the Supreme Court is given power to order all or any part of the original files to be sent up, and may take further testimony in any case not triable by a jury as a matter of constitutional right, "allow amendments of pleadings or process, and adopt any procedure not inconsistent with this act which it may deem necessary or expedient for a full and final hearing and determination of the cause."

Quite a number of minor changes and corrections are made, and provision is made for the attachment and seizure on execution of corporate stocks. One of the main purposes of the revision is to put an end to reviewing mere matters of practice in the Supreme Court, and to require a consideration of the merits of the case as it was presented to the trial court with a view to a final determination of the cause, rather than an approval or condemnation of the various rulings of the trial judge.

THE ORATORY OF LORD ERSKINE.

THE greatest advocate that ever practiced at the English bar was undoubtedly Thomas Erskine. As a man, he had many faults. As a legislator, he was a failure. As chancellor, he was so unreliable that his decisions received the nickname of the *Apocrypha*. "Only the youngest members of the profession," says Sir Frederick Pollock, "need be warned that Erskine's Equity has never been valued at the same rate as his eloquence." But, whatever his failings in Parliament, or as a judge, he was, as Lord Campbell has said, "without an equal in ancient or modern times as an advocate in the forum." It was not that he was remarkable for oratory only. He gained his reputation for eloquence, as used for and bent to the purposes of advocacy. He never lost sight of the business in hand — the client — the case — the verdict. Under all his brilliant speech was the hard head of the *nisi prius* lawyer. His fame was built, as Brougham has said, on the matchless skill with which he could subdue the genius of a first-rate orator to the uses of the most consummate advocate of the age. . . .

Erskine's first client was the Captain Baillie who has just been mentioned. Baillie was lieutenant-governor of Greenwich Hospital, and had exposed certain abuses in the management of the hospital. His conduct was resented by Lord Sandwich, the First Lord of the Admiralty, on whom he had reflected severely, and proceedings were taken against him for a criminal libel Erskine happened to visit Wellbore Ellis when Baillie was dining there, and, ignorant of his presence, inveighed against the conduct of Lord Sandwich. Baillie, learning that Erskine had himself been at sea, sent him a retainer next day. When the case was tried, three of the counsel retained by Baillie advised a compromise, but Erskine resisted the proposal. When Erskine's turn came to speak he made so fierce an onslaught that, although perfectly irregular, it carried the day. Jekyll came into court in the middle of the speech and found the court, judges and all, "in a trance of amazement." Erskine always said that this speech put him on his feet at once. His experience was like that of Cicero, when he defended Roscius Amerinus. It gave him such a position as an advocate, "*ut non ulla (causa) esset, quæ non digna nostro patrocinio videretur.*" He was considered good enough to appear in any cause.

Erskine is the only English lawyer whose speeches as an advocate have secured a permanent place in the literature of oratory. He lived in the golden age of English eloquence. As it was said by the historian Paterculus that only in the lifetime of Cicero was there any great eloquence in Rome, so it has been said that no member of either house of Parliament will be ranked among the orators whom Lord North did not see, or who did not see Lord North. Erskine belonged to the group that had seen Lord North. His place among the orators is secure. In the early years of leisure which fall to the lot of most young men at the bar, no better employment could be followed than a careful study of Erskine's speeches. It is not enough to read them once. They should be read and re-read and analyzed. His defenses were, as Mr. Richard Harris, K. C., says in his well-known "Hints on Advocacy," "artistic in the truest sense." "The mode, the art, of presenting the case," says Mr. Harris, "was more even than the matchless eloquence by which it was accompanied."

Eloquent and effective as Erskine's defenses were, they have characteristics which a modern advocate would avoid. The personal element is a prominent feature. Erskine was nothing if not vain. He was nicknamed Counsellor Ego, and, when he was raised to the peerage, it was suggested that he should take the title of Baron Ego of Eye, in the county of Suffolk. He appears never to have felt any necessity for suppressing his own personality. At times his vanity becomes slightly absurd. In the speech for Thomas Walker and others, for example, he says he has no interest in the destruction of the constitution, and he gives a Harcourtian reason. "I have the honour to be allied to His Majesty in blood," he says, "and my family has been for centuries a part of what is now called the aristocracy of the country; I can therefore have no interest in the destruction of the constitution." He constantly expresses his own belief in the innocence of his clients — a course which no good advocate, who knows his business, would now think of adopting. "If an advocate," he says in his speech for Thomas Paine, "entertains sentiments injurious to the defense he is engaged in, he is not only justified but bound in duty to conceal them; so, on the other hand, if his own genuine sentiments, or anything connected with his character or situation, can add strength to his professional assistance, he is bound to throw

them into the scale." This view, however, is no longer held by English lawyers.[1]

Erskine in his defenses expresses his own opinions on all sorts of highly controversial subjects with the utmost boldness. He never hesitates to vent his political and religious views. Some of his speeches are pure and undiluted political addresses. His speech to the jury in the *Perry and Lambert Case* is simply a defense of Whiggism. He had the greatest admiration for the writings of Burke. "The most common subjects," he says, "swell into eloquence under the touch of his sublime genius." He constantly quotes from his political works. It is said that he read and re-read Burke's speech against Warren Hastings until he knew it by heart. But we do not find in his speeches those eloquent statements of political first principles, in which Burke's orations are so rich. Here and there we find an epigrammatic passage, but they are few and far between. A single instance may be cited. "When men," he says in one place, "can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface; but, pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."

In some of his political defenses, he gives long extracts from the writings of others. The speech for Thomas Paine may be taken as an illustration of this statement. Paine was prosecuted for writing a book in reply to Burke, in which he upheld the right of the people to change their government, if they thought proper. Erskine in his defense showed that the views of Paine were identical with those of Paley, Locke, David Hume, and even Burke himself, and quoted freely from those writers. He argued that Paine had a right to express them. He quoted Milton, Hume, Dr. Johnson, Stanhope, and Lord Loughborough, in support of the freedom of the press. Going through the various passages selected by the information as seditious, he indorsed or explained them away, quoting in support of Paine's views Hume, Mr. Cappe, "a late eminent and pious minister at York," Burke himself, and Pitt. He turned aside to defend Harrington, the author of "Oceana," who had in a recent pamphlet been coupled with Paine, the two being described as obscure blackguards. He quoted an extract from Milton, containing the fine passage which begins, "Methinks I see in my mind a noble and puissant nation rousing herself like a strong man after sleep." He uttered a panegyric of Mr. Fox, and concluded with the reference to Lucian's fable of Jupiter and the countryman.

The finest speech of Erskine was his defense of Stockdale. If it has a fault, it is that it is too fervid and ornate. It may be said of it, *abundat dulcibus vitiis*. Brougham greatly admired a passage in the speech, which may be quoted as a sample of Erskine's florid eloquence. Brougham ascribed the beauty of the passage to its rhythm, and pointed out that it was in iambics.

"Gentlemen, you are touched by this way of considering the subject, and I can account for it. I have been talking of man and his nature, not as they are seen through the cold medium of books, but as I have myself seen them in climes reluctantly submitting to our authority. I have seen an indignant savage chief surrounded by his subjects, and holding in his hand a bundle of sticks, the notes of his unlettered eloquence. 'Who is it,' said the jealous ruler of the forest, encroached upon by the restless foot of English adventure, 'who is it that causes these mountains to lift up their lofty head? Who raises the winds of the winter, and calms them again in the summer? The same Being who gave you a country on your side of the water, and ours to us on this.'"[2]

Erskine was indebted to nature for a singularly sweet and flexible voice. Plutarch, in his enumeration of the ten Greek orators, is careful to mention their excellent voices, and the pains bestowed by some of them in training them. Erskine had a charm of voice which in itself enchained attention, and which was adequate to any emergency. Like other great orators of ancient and modern times, he went to the stage for lessons in elocution. Demosthenes studied delivery under the comedian Satyrus. Cicero studied under the comic actor Roscius and the tragedian Æsopus. Gambetta studied under the famous Coquelin. Erskine found his model in Mrs. Siddons, whose cadences and intonations he carefully noted. He once said that he was indebted for his best displays to the harmony of her periods and pronunciation.

Erskine was an unflinching upholder of the dignity and integrity of the bar. There is a fine passage in his speech for Thomas Paine, too long to quote, in which he enlarges upon the duty of an advocate. He was much attacked for undertaking the defense of Paine, and he justifies his action in unhesitating language. "Little indeed did they know me, who thought that such calumnies would influence my conduct. I will forever; at all hazards, assert the dignity, independence, and integrity of the English bar, without which impartial justice, the most valuable part of the English constitution, can have no existence." This passage recalls the boldness of another great advocate, Cicero, who, in his speech for Roscius Amerinus, gives utterance to words worthy to be placed beside those of Erskine. The opponent of Roscius was supported by very powerful friends, and Cicero says that perhaps he acted rashly under the impulse of youth in undertaking the defense. But having once undertaken it, no terror or danger would keep him from standing by his client. One occasion, on which Erskine refused to allow Mr. Justice Buller to browbeat him, is famous "Sit down, sir," said Mr. Justice Buller. "Remember your duty, or I shall be obliged to proceed in another manner." Erskine retorted, "Your lordship may proceed in what manner you think fit. I know my duty as well as your lordship knows yours. I shall not alter my conduct."

Erskine, like Cicero, found that boldness in the performance of his duty paid in the end. Cicero told his son that the surest way to attain reputation and favor as an advocate was to undertake the defense of those who were oppressed or overborne by the influence of powerful opponents, as Cicero himself had done in the case of Roscius Amerinus. Erskine's experience was the same, and with the passage in which he says so this article may fitly be concluded:—

"It was the first command and counsel of my youth always to do what my conscience told me to be my duty, and to leave the consequences to God. I shall carry with me the memory, and, I hope, the practice of this parental lesson to the grave. I have hitherto followed it, and have no reason to complain that the adherence to it has been even a temporal sacrifice. I have found it, on the contrary, the road to prosperity and wealth; and shall point it out as such to my children."

J. A. LOVAT-FRASER, in *Law Magazine and Review.*

[1] Quintilian (Institutes, Bk. xi, c. 1, s. 3) condemns this practice. "They likewise are arrogant," he says, "who are peremptory in asserting the goodness of their cause, and that if it were not such, they would not have undertaken it. The judges, indeed, cannot bear to hear one presuming to exercise their function." Perhaps the last instance in England in which an advocate of prominence avowed his personal belief in his client's innocence was in the Rugeley poisoning case, when Serjeant Shee stated his belief that Palmer was innocent.

[2] This famous passage is differently given in different works. The above version is from the chapter on Erskine in *Public Characters of 1799–1800*, published in London in 1799.

The other quotations in the article are from *Speeches by Thomas Lord Erskine, with a Memoir by Edward Walford*, 1880.

Cases of Interest.

LEVITY OF COURT AS GROUND FOR NEW TRIAL. — In Bellamy *v.* State, 47 So. Rep. 868, the Supreme Court of Florida was asked to set aside a conviction because during the course of the trial, when the defendant asked to have a witness by the name of Ananias sworn and put under the rule, the presiding judge suffered a lapse of severe judicial decorum and smiled. Ananias was not tendered as a witness and it did not appear what testimony was expected from him. The court declared itself unable to see what harmful effect the visible amusement of the judge could have produced.

RIGHT TO STOP PAYMENT OF CERTIFIED CHECK. — In Blake *v.* Hamilton Dime Savings Bank Co., 87 N. E. 73, the Ohio Supreme Court holds that the drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay, and that a bank that has received a certified check for deposit and has credited it to the depositor is a *bona fide* holder and may enforce payment of it out of the drawer's funds, although, before payment to the depositor of the check, the bank was notified that the check was fraudulently obtained by the depositor.

LIABILITY OF INNKEEPER FOR INJURY TO GUEST CAUGHT IN FOLDING BED. — In Lyttle *v.* Denny, 71 Atl. Rep. 841, the Supreme Court of Pennsylvania holds that where a guest in an inn is furnished with an old-fashioned folding bed with a wardrobe in the back, and while the guest is lying upon such bed the back falls down and injures him, that fact alone is evidence that the injury is the result of the negligence of the innkeeper, and that the burden of proof is on him to show that the accident happened from no want of care on his part. "The accident was so far out of the usual course that no fair inference can arise that it could have resulted from anything less than negligence upon the part of the management of the hotel. Beds do not usually operate as spring traps to close upon and catch the confiding guest." *Per* Patten, J.

ADMISSIBILITY OF MORTALITY TABLES IN CIVIL DAMAGE ACTION. — In Acken *v.* Tinglehoff, 119 N. W. Rep. 456, the Nebraska Supreme Court expresses a grave doubt of the possibility of reforming a confirmed drunkard, by holding, in an action by the wife of such drunkard for damages under the civil damage law, that the Carlisle tables of mortality as evidence of her husband's expectancy for life are admissible upon the question of damages as showing the length of time for which the plaintiff and her children are to be deprived of the husband's support. There was evidence that the husband stayed in a condition of almost continuous drunkenness and that when frequenting the saloons of the defendants late at night, he maintained a stolid indifference to the entreaties, not only of his wife, but of his aged mother and his little boy. The evidence was considered sufficient to permit a finding of permanent disability and to render the mortality tables admissible.

LIABILITY FOR INJURY TO PASSENGER RIDING ON SCENIC RAILWAY. — In Lumsden *v.* L. A. Thompson Scenic Railway Co., 114 N. Y. Supp. 421, the New York Appellate Division, First Department, holds that a company operating a scenic railway at an amusement resort carrying passengers rapidly over steep inclines is not negligent in failing to notify passengers to hold fast and not fall off during the rapid motion of the car, and that a passenger on such railway, understanding the nature of the entertainment, assumes the risk of the ride caused by the usual motion of the car, which necessarily jerks when descending steep inclines, and cannot recover for injuries sustained in being thrown from the car by such a jerk. The evidence showed that the defendant operated at Coney Island thirteen scenic railways, including that on which the plaintiff was injured, and had carried approximately 20,000,000 persons on them and that no one besides the plaintiff had ever been injured.

DUTY OF STATE COURT TO SUSTAIN STATE STATUTE IN CONFORMITY TO VIEWS OF UNITED STATES SUPREME COURT. — In McCollum *v.* McConaughy, 119 Iowa 539, the Supreme Court of Iowa overrules two of its former decisions which held that the state statute prohibiting any person from soliciting orders for the purchase or delivery of intoxicating liquors was unconstitutional when applied to an agent of a nonresident soliciting orders for liquor to be shipped directly to the purchaser, because in conflict with the interstate commerce clause of the Federal Constitution. Subsequent to these decisions the United States Supreme Court held in Delamater *v.* South Dakota, 205 U. S. 93, that a similar statute did not violate the interstate commerce clause, and the Iowa court now gives effect to the statute of its state in accordance with the view of the highest federal court. It is held that no binding obligation rests on a state court to sustain its statutes in conformity to a decision of the United States Supreme Court even when the ground of invalidity depends upon the interpretation of the Federal Constitution, but the court elects to change its rulings and give effect to the policy of the statute.

ALIMONY FOR THE RICH. — In Gould *v.* Gould, 114 N. Y. Supp 331, the plaintiff Katherine C. Gould, in a pending action for divorce, who, it appears, was already in receipt of an annual allowance from her husband of $25,000, applied to the Supreme Court of New York county for additional alimony. She claimed that the sum received was inadequate to her needs, and asked for an award of $120,000 per annum, because her husband's income was more than three times that amount, and she had become versed in the details of spending it. The schedule of her actual needs submitted to the court amounted to something less than a paltry $7,000 a month, and the justice took it as established that she could physically succeed in spending the entire $120,000 should the court direct her husband to give her the means. This, however, the court declined to do, holding that there is no rule of law that a wife is entitled to one-third of her husband's income as alimony *pendente lite*, irrespective of the relation of that income to her reasonable expenditures, and the plaintiff is left to worry along as best she can on the $25,000 per year, complaining bitterly that she has suffered grievous injury to her "station in life."

UNFAIR COMPETITION BY SIMULATION OF DEVICES NOT SUBJECT OF VALID TRADEMARK. — In Wolf Bros. & Co. *v.* Hamilton-Brown Shoe Co., 165 Fed. 413, the Circuit Court of Appeals for the eighth circuit enjoined the defendant from the use of the name "The American Lady Shoe" and certain devices with which it designated one of its makes of shoes, as a simulation of the names and devices used by the complainant to designate its shoes, although the complainant's name and devices were held not to be the subject of a valid trademark. The complainant had used the name "The American Girl" to designate a woman's shoe manufactured by it, and extensively advertised the same, with the phrase "as good as its name" and the picture of a young woman. It also used the numerals 403 and 404 to indicate different styles of the shoe. Subsequently the defendant adopted the name "The American Lady" for shoes of its make, with the words "with the character of the woman," and also used the picture of a young woman and the same numbers displayed by the complainant. It was held that the names and devices used by the defendant indicated an intention to deceive purchasers and constituted unfair competition against which the complainant was entitled to protection.

INTENTION OF FRAMERS OF CONSTITUTION TO PROHIBIT SALE OF LIQUOR TO BE DRUNK ON PREMISES. — In Appeal of Allyn, 71

Atl. Rep. 794, the Connecticut Supreme Court of Errors is appealed to by a taxpayer and asked to decide that the statute authorizing licenses for the sale of intoxicating liquors is void, and that county commissioners have no authority to grant a license in pursuance thereof. The appellant claimed that the sale of intoxicating liquors to be drunk as a beverage at the place of sale is so destructive to the public health and so inherently immoral that no law upholding the traffic can be valid either under the Constitution of the State or of the United States. His contention, as stated by the court, was "That, as the people of Connecticut, in the preamble of their constitution, gratefully acknowledge 'the good providence of God, in having permitted them to enjoy a free government,' this is a recognition of God as the source of that government; that the Bible contains the 'Word of God;' that it condemns the use and sale of intoxicating liquors as a beverage; and therefore that the state cannot permit it on any terms." The court quotes a statute of the Connecticut colony as far back as 1650, providing for the regulation of such persons as "retaile wine, beare," etc., and summarily rejects the idea that the framers of the constitution intended to prohibit altogether the licensing of the liquor traffic.

Validity of Conditional Pardon. — In *Ex p.* Kelly, 99 Pac. 368, the California Supreme Court holds that a pardon by the governor containing a condition that if the criminal shall ever be convicted of any felony the commutation of sentence shall be void, and that in addition to the penalty that may be imposed for said felony he shall be compelled to serve the remainder of the commuted sentence, is valid and enforceable in respect to the condition. Chief Justice Beatty said: "This question, so far as I am advised, is entirely new. No authorities are cited, and I know of none. Regarded as an original proposition it seems reasonable to say that since the power of the governor to grant pardons and commutations is absolute under the constitution, . . . the power to annex to a pardon or commutation any reasonable condition, prior or subsequent, is implied." It appears, however, that conditional pardons are not unknown to the law and are generally held binding. See the title Reprieve, Pardon, and Amnesty, 24 Am. and Eng. Encyc. of Law (2d ed.), page 595, where it is said: "Where a prisoner has accepted a conditional pardon and has been released from imprisonment by virtue thereof, but has violated or failed to perform the condition, the pardon in case of a condition precedent does not take effect, and in case of a condition subsequent becomes void, and the criminal may thereupon be arrested and compelled to undergo the punishment imposed by the original sentence, or as much thereof as he had not suffered at the time of his release." Cases are cited from nine jurisdictions. But it is quite possible that the condition in the pardon before the California court possessed some unique features.

Waters-Pierce Oil Company Ousted from Texas. — In Waters-Pierce Oil Co. *v.* United States, 29 Sup. Ct. Rep., 220, the United States Supreme Court, by a unanimous opinion, affirmed the decision of the Supreme Court of the State of Texas forfeiting the permit of the defendant oil company to do business within the State, and assessing penalties against it in the aggregate sum of $1,623,500 for violation of the anti-trust laws of the State. It was found by the State courts that the majority of the stock of the defendant Waters-Pierce Company was owned by the Standard Oil Company, of New Jersey; that the two companies were under the same management, and that such combination destroyed competition, and increased and maintained the prices of oil products in the State, in violation of the Texas statute making it unlawful to enter into any agreement to fix prices of any article or commodity or to prevent or lessen competition. It appeared that the defendant had continued to do business in the State notwithstanding a former judgment of ouster and in defiance of the State authorities. The evidence showed that the value of its property amounted to more than $40,000,000, and that its dividends had been as high as 700 per cent. per annum. The United States Supreme Court held that the judgment appealed from did not amount to a denial of due process of law or other federal rights, and that the amount of the fine, which was the aggregate of penalties of $1,500 a day for 1,033 days, and of $50 a day for 1,480 days, during the violation of the law, was within the police power of the State, and not so excessive as to deprive the defendant of its property without due process of law.

News of the Profession.

New Brunswick Barrister Dead. — Lewis A. Mills, K. C., a distinguished barrister of New Brunswick, died at his residence in St. Stephen on February 23.

Spear Reappointed to Maine Court. — On February 16, Hon. Albert M. Spear, of Gardiner, was renominated associate justice of the Maine Supreme Court, by Governor Fernald, for a second term of seven years.

Federal Attorney for Hawaii. — On February 25, President Roosevelt nominated A. L. C. Atkinson, of Hawaii, to be United States attorney for that territory in succession to Robert W. Breckons, resigned.

Elected to Rhode Island Superior Court. — On March 3, the general assembly of Rhode Island elected Christopher M. Lee to be a justice of the Superior Court of that State, in place of Hon. Charles C. Mumford, resigned.

The American Society of International Law will hold its third annual meeting in Washington, D. C., on April 23 and 24. The attention of the convention will be directed principally to the question of arbitrations of international disputes.

Former Federal Judge Dies in Oklahoma. — Hon. Hosea Townsend, United States judge for the southern district of Indian Territory, from 1897 until Oklahoma became a State, died in Ardmore, Okla., on March 4, aged sixty-nine.

Chief Justice of Manitoba to Retire. — Chief Justice Dubuc, of Manitoba, is to retire within a few months, after thirty years of service on the bench. After his retirement Judge Howell, of the Court of Appeal, will become chief justice.

Dates for Bar Meetings. — The annual meeting of the Iowa State Bar Association will be held this year at Marshalltown, on June 24 and 25, and the Tennessee lawyers will convene about the same time at Chattanooga.

Death of Prominent New Yorker. — Edward Mitchell, former United States attorney for the southern district of New York, and a well-known member of the bar of New York city, died at his home there on February 15, aged sixty-seven.

West Virginia Judges Get Better Pay. — On March 4 an act went into effect increasing the salaries of the justices of the West Virginia Supreme Court to $5,500 a year. By the same measure the attorney-general's compensation was raised to $4,500.

Missouri's Oldest Lawyer Dies. — Judge William C. Toole, said to be the oldest lawyer in Missouri, died in St. Joseph on February 17, aged ninety-one. He was a native of Kentucky but went to Missouri in 1838 and was admitted to the bar there in 1848.

Mayor Tom L. Johnson Studying Law. — Tom L. Johnson, the versatile mayor of Cleveland, Ohio, has announced his in-

tention of preparing for admission to the bar of his State under the preceptorship of Newton Baker, city solicitor of Cleveland. Mayor Johnson is fifty-four years of age.

Boston's New District Attorney. — On February 17, Governor Draper named Arthur D. Hill to be district attorney of Suffolk county in the place of the late John B. Moran, to serve until the general election next November. Mr. Hill is forty years old and a graduate of the Harvard law school.

Hugh Jennings to Practice in Pennsylvania. — Hugh Jennings, manager of the Detroit baseball team and formerly one of the greatest shortstops that the game has ever known, has been admitted to the Pennsylvania bar. When not occupied with his baseball duties he will practice law in Scranton.

Boston Lawyer Killed by Train. — Waldron Bates, a well-known lawyer and clubman of Boston, was on February 10 run over and killed by a train on the Southern railroad near Lynchburg, Va. Mr. Bates, who was *en route* to Aiken, S. C., left the train when it stopped to change engines, and in attempting to board it after it had started, fell under the wheels, He was fifty-two years old.

Hydrick Made Justice of South Carolina Supreme Court. — Circuit Judge D. E. Hydrick, of Spartanburg, has been elected associate justice of the Supreme Court of South Carolina to fill the vacancy caused by the retirement of Chief Justice Pope. Justice Hydrick is forty-nine years of age and has won an enviable reputation both as a practicing lawyer and a circuit judge.

Death of ex-Judge Charles E. Parker. — Hon. Charles E. Parker, formerly presiding justice of the Appellate Division of the New York Supreme Court, Third Department, died at his home in Owego, N. Y., on March 3, of apoplexy. Judge Parker was born in Owego in 1836. He was elected to the New York Supreme Court in 1883 and served continuously until retired on the age limit in 1906.

First Woman Judge in France. — The distinction of being the first of her sex to attain judicial honors in France has fallen to Mme. Clemence Jusselin who has recently been made a member of the Conseil des Prud'hommes. This is a court which sits to try trade disputes between employers and employees. Its headquarters in Paris are at the Tribunal de Commerce, and it is composed of six judges, three employers and three workers. Mme. Jusselin represents the workers.

Death of ex-Judge of South Carolina Supreme Court. — Hon. S. L. Hoge, of Kenton, Ohio, died in Battle Creek, Mich., on February 23, aged seventy-three. During the "carpet-bagging" days following the Civil War Judge Hoge served as a judge of the South Carolina Supreme Court and represented that State in Congress for two terms. During the time he was on the bench he never delivered an opinion.

Judge of Canada's Supreme Court Retires. — On February 13, Hon. James McLennan, justice of the Supreme Court of Canada, resigned his seat on the bench, retiring on superannuation. Justice McLennan is seventy-six years of age. He was made a justice of the Ontario Court of Appeal in 1888 and in 1905 was promoted to the Supreme Court. The vacancy in the latter court has been filled by the promotion of Hon. F. A. Anglin from the Ontario High Court.

Distinguished Chicago Lawyer Dead. — Frederick S. Winston, senior member of the Chicago law firm of Winston, Payne, Strawn & Shaw, and one of the best known corporation lawyers in the country, died March 8 at Pasadena, Cal., to which place he had gone in search of health. Mr. Winston was born in Kentucky in 1856. He was a graduate of Yale and of the Columbia University law school. In 1884 he was made corporation counsel for Chicago but soon resigned.

Shorter Hours for German Lawyers. — The Berlin Civil Solicitors' Association is conducting a campaign to induce German lawyers to close up shop by six o'clock. At present it is the usual thing for the lawyers to be in their offices until eight or nine o'clock, and it is difficult to see how earlier closing can be brought about so long as the Germans find it necessary to "knock off" for an hour or so about five times a day for feeding purposes.

Bench Changes in Connecticut. — Hon. Frederick B. Hall, of Bridgeport, associate justice of the Connecticut Supreme Court, was on March 2 nominated by Governor Lilley to be chief justice of the court to succeed Hon. Simeon E. Baldwin who will retire on the age limit early next year. Other nominations made at the same time by the governor were as follows: Associate justices of the Supreme Court, Samuel O. Prentice, of Hartford, Silas A. Robinson, of Middletown, and George W. Wheeler, of Bridgeport; judges of the Superior Court, Edwin B. Gager, of Derby, William S. Case, of Hartford, and Milton A. Shumway, of Killingly.

Federal Judge Richards Dead. — Hon. John Kelvey Richards, a judge of the United States Circuit Court of Appeals, Sixth Circuit, died at his home in Cincinnati on March 1 of Bright's disease. Judge Richards was a native of Ohio and was fifty-three years old. After graduation from Swarthmore in 1875 and from Harvard in 1877, he studied law and was admitted to the bar in 1879. In the following year he was elected prosecuting attorney of his home county, Lawrence, and thereafter held successively the offices of city attorney of Ironton, Ohio, State senator, attorney-general of Ohio, and solicitor-general of the United States. In 1903 he was made United States circuit judge, succeeding Judge William R. Day who was promoted to the federal Supreme Court.

Unconfirmed Federal Judges. — With the expiration of President Roosevelt's term of office five of his nominations for federal judgeships fell to the ground for lack of confirmation by the Senate. Milton D. Purdy, the celebrated trust-buster of Minnesota, failed of confirmation because the Minnesota senators were not consulted in the selection. John E. Sater, of the southern Ohio district, was opposed by Senator Foraker. Oscar R. Hundley, of the northern district of Alabama, was vigorously opposed by the bar of the state, and the North Carolina lawyers were not satisfied with the selection of Herbert F. Seawell for the judgeship of the eastern district of that State. Royal A. Gunnison, judge for Alaska, was held up on account of charges that during the term he had already served he had never rendered a decision. The filling of all these vacancies of course falls to President Taft.

Florida State Bar Association. — The third annual meeting of the Florida State Bar Association was held in St. Augustine on February 19 and 20. The morning session of the first day was devoted to committee reports and other routine business, but in the afternoon the president's annual address was delivered by President Frederick T. Myers, of Tallahassee, whose subject was "Which, the Mob or the Law." He was followed by Judge Rydon Call, who read a paper on "The Judiciary Article of the State Constitution." The principal address was delivered on the second day of the meeting by Hon. Hannis Taylor, former minister to Spain, who spoke on "The Science of Jurisprudence." Other papers were "The Bench and Bar the Only Safeguard against Centralization," by Hon. George C. Martin, of Brooksville, and "Proximate and Remote Causes in the Law of Torts," by A. A. Boggs, of Miami. The meeting was closed with a banquet at the Hotel Ponce de Leon, at which Hon. Duncan U. Fletcher acted as toastmaster. The following officers were elected for the ensuing term: Presi-

dent, E. R. Gunby, of Tampa; secretary, George Couper Gibbs, of Jacksonville; treasurer, John W. Burton, of Arcadia.

William Wirt Howe Dead. — William Wirt Howe, one of the most eminent members of the New Orleans bar, twice president of the American Bar Association, and one of the consulting editors of the American and English Encyclopædia of Law and Practice, died March 17, aged seventy-six. He was a native of Canandaigua, N. Y.; a son of Henry Howe, for many years principal of the Canandaigua Academy. He was graduated from Hamilton College, Clinton, N. Y., practised in New York and St. Louis, enlisted in the Union army in the Seventh Kansas Volunteers and rose to the rank of major. Going to New Orleans during the civil war, he settled there, served one term as judge of the Criminal District Court, and was associate justice of the Louisiana Supreme Court from 1868 to 1873. He was tendered the position of United States district attorney by President McKinley, but declined; was tendered it again by President Roosevelt and accepted, but subsequently resigned. He was treasurer of the University of Louisiana, president of the Louisiana Historical Society, president of the New Orleans Civil Service Commission, and a trustee of the Carnegie Institution at Washington. He was elected president of the American Bar Association in 1897. Judge Howe was an able lecturer on law, appearing before the Yale law school, the University law school in New York, the University of Pennsylvania, and the Columbian University in Washington. He was the author of studies in civil law and a municipal history of New Orleans.

English Notes.

Made a Privy Councilor. — Sir John Edge, formerly Chief Justice of the High Court of the Northwest Provinces, India, has been appointed a member of the Judicial Committee of the Privy Council.

Forgetfulness as Mistake in Equity. — In the recent case of Lady Hood *v.* McKinnon, noted in the *Law Times* for Feb. 20, 1909, at page 351, Mr. Justice Eve, sitting in the Chancery Division, held that a person who makes a mistake through forgetfulness of facts which exist is in the same position as one who makes a mistake as to facts which do not exist, and that it is immaterial whether a person has forgotten or been misinformed.

Lord Robertson's Successor. — The Right Hon. Thomas Shaw, K. C., M. P., Lord Advocate for Scotland, has been appointed a Lord of Appeal-in-Ordinary in the place of Lord Robertson, recently deceased. The new member of the House of Lords is fifty-nine years of age and was admitted to the Scottish bar in 1875. He was Solicitor-General for Scotland in 1894-5 and was made Lord Advocate in 1905. In the latter office he is succeeded by Mr. Alexander Ure, K. C., M. P., who is advanced from the post of Solicitor-General.

Not in the Style. — English judges appear to be a bit fastidious as to the attire of lawyers practicing in their courts. Note this fashion hint from the *Law Journal:* "Judge Bacon, addressing a solicitor at the close of a case in the Whitechapel County Court on February 11, said: 'I do not wish to suggest any improvement in the dress or attire of solicitors, but I really do not think it is proper for a black gown to be on such a light coat.' The solicitor bowed his acknowledgment to the judge, whose objection was well founded on many judicial precedents."

A Way to Keep Judges in Health. — Among the bills "dropped" at the close of the last session of Parliament was one to enable county judges to draw their pay while incapacitated by illness. By a statute of 1888 provision was made for deducting from the salary of a county judge who was unable to attend to his duties the amount necessary to pay for the services of a deputy judge, and since that time numerous attempts have been made to secure the repeal of the provision but without success. Hardship has doubtless resulted in some cases, but it is said that the county judges as a rule have appeared to be the healthiest members of the British judiciary.

The Tolpiddle Martyrs. — In these days when England is practically at the mercy of the labor unions it is difficult to realize that less than a century ago the formation of such a combination was punished by the law as a heinous crime. A recent proposal to erect at Tolpiddle a home for aged and indigent farm laborers in memory of the Tolpiddle "martyrs," has brought to mind the fact that in 1834 six agricultural laborers were sentenced to seven years transportation for forming a union to obtain better wages. They were sent as convicts to Tasmania, but were eventually released at the instance of Sir John Russell.

Sir Gorell Barnes Resigns. — Sir Gorell Barnes has resigned the office of President of the Probate, Divorce and Admiralty Division of the High Court. He was appointed a judge of the division in 1892 and succeeded Sir Francis Jeune as president in 1905. Sir Gorell Barnes is now sixty years old. Mr. Justice Bigham has been appointed to succeed to the presidency of the division, and the vacancy caused thereby in the King's Bench Division has been filled by the appointment of Mr. John Andrew Hamilton, K. C. The new judge, who, since he took silk in 1901, has occupied a foremost place as a commercial lawyer, was called to the bar at the Inner Temple in 1883. He is fifty years old.

Unintentional Publication of Libel. — In the recent case of Sharp *v.* Skues, the Court of Appeal has held that the writer of a libelous letter addressed to an individual is not responsible for the publication thereof through the opening of the letter by the business partner of the addressee, if the writer did not intend it to be so opened and knew that there was little likelihood thereof. The decision is commented on editorially in the *Law Journal* for Feb. 20, 1909, at page 114, where it is suggested that the reasonable assumption, when a letter not marked "private" or "personal" is sent to a man's place of business, is that it will be treated as a business communication and opened by some one else if the addressee chance to be absent. A summary of the decision is given in the *Law Times* of the same date at page 350.

Advantages of Having Barristers and Solicitors. — In an address made recently at Liverpool Lord Gorell, better known as Sir Gorell Barnes, gave it as his opinion that the separation of the legal profession into two branches was in large measure responsible for the rapidity with which causes were tried and decided in England, and that the system had many advantages over one where the functions of solicitor and barrister were amalgamated. He said he had seen the latter system in operation in America, and there were certain drawbacks to it of a very serious nature. In England litigants were able to command the services of men who were particularly acquainted with a particular branch of work before a particular judge, whose touch with one another and the judge was such that he did not believe that in any other country in the world cases were so easily handled. It had been, he thought, the foundation to a great extent of the success of the British nation throughout the world, that justice had been splendidly administered as a whole. In other countries trials were longer and more costly for the reason that the men engaged in them were not in touch with each other.

RESPECTIVE RIGHTS OF PIGS AND AUTOMOBILES IN HIGHWAYS. — In the recent case of Higgins *v.* Searle, the Court of Appeal had to solve this question: When a horse, a motor-car, and a pig meet upon the highway and the horse shies at the pig, by reason of which the driver of the car is forced to run into a wall in order to avoid the horse, is the owner of the pig liable for the resulting damage to the car? After serious consideration the court reached the conclusion that the injury was not the natural and probable consequences of the pig's presence in the highway, and absolved the proprietor of the said pig from responsibility. This decision would seem to settle the principle that automobilists in venturing upon the highway must assume the risks arising from the presence there of animals *cicuris naturæ* such as the pig and the gentle but unintellectual hen. Possibly the court was influenced by the theory that prevails in certain quarters that all automobilists are hogs and therefore cannot be heard to object to the use of the highways by pigs.

DEMAND FOR REFORM OF DIVORCE LAW. — For some time there has been growing in England a feeling that the divorce laws of that country were not all that they might be, and it is probable that the recent decision of the Court of Appeal in Harriman *v.* Harriman, noted in the *Law Journal* for Feb. 13, 1909, at page 101, will result in early action by Parliament. In that case, which was a suit for divorce on the ground of desertion coupled with adultery, it appeared that the petitioner had been deserted by her husband in 1905, and within a year thereafter she obtained a separation order under the Act of 1895. The court held that the obtaining of the separation order precluded the possibility of a subsequent desertion such as, when coupled with adultery, would constitute a ground for divorce *a vinculo*. Since the wife cannot in England obtain a divorce on the ground of adultery alone, the effect of the decision is that a wife who obtains a separation order on the ground of desertion practically bars herself from securing a divorce thereafter. The only method open to her is to obtain an order for restitution of conjugal rights, which, if disregarded for a sufficient time, will supply the desertion demanded by the law, and to the poor woman that course is not open.

Obiter Dicta.

AN UNEQUAL CONTEST. — A correspondent calls attention to the case of Love *v.* Law, 57 Miss. 596. That struggle is the oldest on the calendars and has led only too often, alas! to the result reached in Commonwealth *v.* Freelove, 150 Mass. 66.

WELL PROVISIONED. — A member of the Georgia judiciary was brought into court recently through the public entrance on a charge of having in his possession four barrels of whiskey. He said he had them solely for his personal use.

LOCATED IN THE RIGHT BUILDING. — Philip Lahr, formerly clerk of the Superior Court, will open an office this week in room 4 of the Varieties Building. Among the lines of business he will transact are the following: Law, real estate, notary public, loans, fire insurance, and serve as receiver for the Terre Haute and Merom Traction Company. — *Terre Haute Tribune.*

A PENALTY OF GOOD NATURE. — In Makim *v.* Attorney-General, (1894) App. Cas. 57, wherein Mr. Makim had been convicted of murdering an infant, one of the witnesses testified that the prisoner had told him he was in prison "for baby-farming, that there were seven found and there was another to be found, and when that was found he would never see daylight any more; that is what a man gets for obliging people."

WHY DENY THIS INNOCENT PLEASURE? — Some persons are disposed to point to the revival of the guillotine in France as an argument against the abolition of capital punishment. But the argument is somewhat weakened by the fact that the railroads have found it profitable to run special excursion trains to the scene of the executions. At least the latter fact is an equally strong argument in favor of public executions. If it is necessary for the state to kill people, why not let us have a little fun out of it, the way the French do?

MUST HE BE CALLED JOHN? — In the Recorder's office at Columbus, Ohio, there was filed recently a chattel mortgage on property described therein as "a cat called John." Will some friend kindly forward to us the name and address of the mortgagee? There are a number of cats in this vicinity, which have been called by a variety of names other than John, and we should be only too glad to use them as collateral even though it were necessary to call them anything as mild as John. Most of ours are named Thomas.

GENUINE REFINEMENT. — We have taken occasion heretofore to comment admiringly on the delicacy so universally displayed by the newspapers in their allusions to "the statutory ground" for divorce. Now comes the Charlotte (N. C.) *Observer* with a new euphemism which will doubtless be seized upon with eager gratitude by all the other modest gentlemen of the press. In an issue of recent date we read that "the first case was that of Mary Morgan *v.* Daniel Morgan, for absolute divorce for Biblical reasons." Considerable water will have passed under the bridge before anybody succeeds in coining a sweeter, less harmful, or more reverential name for a spade than that.

HARD TO CONVINCE. — Magistrate Herman, of the Harlem police court in New York city, appears to be a very skeptical jurist. Recently the chauffeur of Mr. Walter F. Graff was before him on a charge of driving his automobile at an unlawful speed. Mr. Graff was on hand and testified that he was in the automobile when the arrest was made, that he had been operated on a few weeks previously for appendicitis, and that to have ridden at an illegal speed would certainly have been the death of him. To clinch the matter Mr. Graff hauled out a bottle containing his lost appendix. Now, that would seem to be sufficient evidence to convince even a gentleman from Missouri, but, as before remarked, Magistrate Herman appears to be a skeptical person, for notwithstanding the mute appeal of that vermiform appendix, he held the chauffeur for trial.

A MEDICO-LEGAL EXPERT. — The following communication from a physician relative to a medical examination made of one of the plaintiffs in a personal injury action was recently received by the attorneys for one of the western railroads. The friend who sends it to us expresses the belief that the "Doc" must have been practicing before a justice of the peace:

Helen, Minn., Feb. 1, 1909.

In Res Jimmie Smith,

Claim Dept., A. B. R. R., Helen, Minn.
Minneapolis, Minn.

I have examined Mr. Smith with reference to the purported injuries received January 20, 1909, at Arbutus, Minn. About 4:50 P. M. of that date. I find no objective signs or symptoms which could be construed according to the res gestæ of this affair. The conditions alleged at present by the plaintiff are of subjective significance only; he alleges partial loss of hearing in both ears together with intermittent pain over the region of both temples anterior to both ears; in other words, the location is within the temporal fossae. He also notes more or less impaired function of the Phalango-metacarpal anychondrosis and the radio-metacarpal articulation of the right forearm on the anterior aspect. These are the facts alleged by Jimmie Smith. With reference to the nature of the primary injuries the report of the surgeon made at the time of the alleged accident should

disclose all that might be immediately pertinent to the question under advisement.

Where plaintiff entres for damages the medicolegal phase of it places me as a surgeon of the corporation about as follows:

Statements of patient as to pain and evidence — The Supreme Court of Vermont, in the case of Wilkins vs. Brock. That where a patient makes statements of past pain and suffering when that information is necessary to a correct diagnosis, statements of it may be testified to by the Physician as forming a part of the basis of his opinion. In such cases the statements of the patient have NO HEARSAY quality, but are treated merely as observed facts, forming part of the physicians' data, and bearing on the weight of his opinion, without regard to their correctness or incorrectness. But when such statements are used as direct testimonial evidence of the truth of what they assert they are carried beyond their legitimate scope, for, as to that they are NOTHING BUT HEARSAY. I find as I have said above, no evidence of the perminent injuries, alleged by the plaintiff and whose alligations I am unable to verify also, but whose statements must form the basis of my opinion, which opinion offered in testimony, would be according to the precedent cited, irrelevent, incompetent, immaterial and not subject to proper cross-examination and therefore the premesis vacated.

Yours truly,

WM. WHITE, Surgeon A. B. R. R.

A DEAD HEAT. — In the recent case of Talby *v.* State, (Ga. App.) 63 S. E. Rep. 543, which was a criminal prosecution for the cruel and unusual punishment of a mule, the defendant admitted that he "slapped the mule with the lines." This was on a Thursday, and on the following Saturday the mule died. The jury evidently did not believe that anybody could kill a mule by slapping her with the lines and consequently brought in a verdict of guilty. In concluding an opinion affirming the conviction Judge Russell said: "There are no unusual features in the record, except that counsel for the plaintiff in error, in expressing his indignation that his client should have been convicted, sums up his argument in the following verse:

'No matter how hot is the bottom,
And the mule is beset by the flies,
Let the negro at work in the cotton
Never slap with the lines if he's wise.
Though the lines may be tight on the nigger
And the contract enslaves, he's a fool
If he slaps and then thinks he's bigger
In the eyes of the law than the mule.'

"To this portion of the argument I would reply in perhaps no poorer poesy, and I think much better law:

When the sun shines hot in the bottom,
And the mule is beset with the flies,
The hand and the head which guides the poor beast
Should be at once gentle and wise;
The man who trusts his beast to a plow hand —
For negroes and whites, the law is the same —
Is assured that the statutes and law of the land
Forbid that his brute be tortured or maimed.

So where a mule's in sole charge of a driver,
He (no matter what color his skin)
Must show, if that mule should be injured,
That the hurt was not due to his sin.
True, the law holds the driver far bigger
Than a conscienceless mule to be,
Yet the law should avenge with all vigor
All driver's acts of wanton cruelty."

In view of the superiority of Judge Russell's law, we feel constrained to call it a tie, but the counsel clearly had him outpointed in the matter of metre. As to rhyme, "cotton" would seem to come about as close to "bottom" as "maimed" does to "same."

Correspondence.

REFUSAL OF SHELTER AS TORT.

To the Editor of LAW NOTES.

SIR: Your comments in the February number on Ploof *v.* Putnam, 71 Atl. 188, open a rather broad field of ethical default as a basis for legal liability. The field, however, is not entirely unexplored, as is shown by a Minnesota decision made about two years ago — Depue *v.* Flatau, 100 Minn. 299. In that case the plaintiff sought damages because (as he claimed) the defendants refused him shelter for the night and sent him from their house unattended when they had reasonable ground to believe that on account of his physical condition he would suffer harm from the inclement weather. Depue was a cattle buyer; the Flataus were farmers (father and son) living about seven miles away from Depue's house. After dark, in the late afternoon of an extremely cold day, Depue came to the Flatau farm to buy cattle which they had for sale. They failed to make a bargain about the cattle, but Depue bought some furs from members of the Flatau family. The hour being late and the weather very cold, he asked permission to stay over night. This was refused. The elder Flatau, however, invited him for supper. After they had eaten, Depue made ready to go to his home. Suddenly he became ill, fainting, and falling to the floor. He claimed that when he recovered, his request to be lodged over night was again refused. Defendants denied that this latter request was made, or that they had any knowledge of his illness. All the witnesses agreed that the younger Flatau helped Depue into his cutter and adjusted the robes, and that Depue being unable to hold the reins, the same defendant threw them over Depue's shoulders and went with him a short distance on the way home. The next morning a passing farmer found Depue on the roadside, nearly frozen to death, about three-quarters of a mile from the Flatau house. He had had another fainting spell and had fallen from his cutter and remained exposed during the night. The trial court dismissed the action on the ground that "there was no evidence that either of the defendants knew, or in the exercise of reasonable care ought to have known, plaintiff's condition, or that allowing him to proceed on his journey would expose him to danger."

On the plaintiff's appeal the Supreme Court places the case definitely in the class where a legal duty arises solely from an ethical obligation without a precedent contract. "Defendants," says Judge Brown writing the opinion, "were under no contract obligation to minister to plaintiff in his distress; but humanity demanded that they do so if they understood and appreciated his condition." The court, of course, recognizes that "acts which humanity demands are not always legal obligations," but

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finds differentiating circumstances in that the plaintiff was taken suddenly ill while he was a guest in defendant's house. For this reason "the law, as well as humanity, required that he be not exposed in his helpless condition to the merciless elements." The general principle invoked is that "whenever a person is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect." The lower court took the same view of the law, but there was a reversal because, as held by a majority of the appellate court, the question of defendants' knowledge of plaintiff's condition ought to have been submitted to the jury.

In your comments on the Vermont case one of your queries is whether the principle in that case would not "result in imposing on private householders the duty of receiving travelers who had been caught out in blinding snow storms, or render them liable for the injury to health sustained by the exposure which would result from not receiving them." The Minnesota case touches your query closely. The court, it is true, lays stress on Depue's previous entertainment, but this was of the slightest kind. He was given supper, but was distinctly refused a lodging for the night. In fact the defendants had no closer relation to him than a kind-hearted householder has to a begging tramp served with a luncheon in his kitchen. The wrong of which Depue complained was ultimately based on defendants' failure to use reasonable care to protect him from an injury which they had reason to believe would result from his helplessness; and this wrong would have been the same if he had never been in their house. His case turned on the violation of a duty of protection, and not on the refusal to continue the relation of host and guest. The claim that defendants had given him entertainment and then were guilty of harsh inhospitality excites aversion and perhaps tends to becloud the real issue.

The vagueness of the statement of the controlling principle further illustrates the difficulties of the subject. Whether or not a given "person is placed in a position" of the kind described by the court gives but an uncertain and wavering guide. The gist of the controversy is *when and how* this occurs. Taking the principle literally as given in the opinion, it would seem to cover the very instance you put — of the private householder and the storm-spent traveler. But be this as it may, the case (even when limited to similar or equivalent facts) shows a notable advance of legal liability into the domain of purely ethical obligation.

EMANUEL COHEN.

MINNEAPOLIS, MINN.

ORIGIN OF THE RULE OF THE ROAD.

To the Editor of LAW NOTES.

SIR: In your issue of March, 1909, you conclude your article "A Statutory Rule of the Road" (pp. 225, 226), with an inquiry as to why, in this country, the early colonists reversed "the rule of the road" as it existed in the mother country.

To my mind the reason is plain. In the mother country (as in this country to-day) the *driver* who rode in his vehicle sat on the right of the vehicle, and so he turned to the left, thus bringing the two drivers next each other as they passed, enabling them to see just how close they were to each other, and thereby avoiding a collision.

The same reason actuated the early colonists, but it worked the other way because in a large majority of cases the vehicle was an ox wagon. The driver of oxen walks on the *left* side of his team, and passing each to the right of the other brought the two drivers next each other, thus achieving the same result as passing to the left accomplished when the driver was *riding*

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on the right side instead of *walking* on the left. Having started in "keeping to the right," with the conservatism we have inherited from our English ancestry, we keep it up to-day when the reason no longer exists.

JNO. C. WICKLIFFE.

NEW ORLEANS.

To the Editor of LAW NOTES.

SIR: In your issue for March, 1909, No. 12, Vol. XII., page 225, *Re* Burton *v.* Nicholson, concerning the rules of the road, the last paragraph ends as follows: "How, then, did the English colonists come to adopt the continental rule?" I do not think that they followed the continental rule, but started the custom for a very good reason.

The reason given for the English custom of turning to the left is that the driver who sits in the whip seat can judge his distance better in passing other vehicles in crowded streets and avoid the great danger of interlocking wheels with vehicles going in the opposite direction. When passing a vehicle going in the same direction the custom is to pass on the right, and the *onus* is upon the person going at the greater speed, and he has to take the risk of damage by so passing.

The custom of turning to the right on this continent arose, I think, during the early days of settlement in eastern America, when all roads were originally cut out of the bush, and all roads were lined with stumps of the trees cut along the trail. When two vehicles passed on such a road it was the most natural thing that they should turn out to the right, as by doing so the driver could better avoid the stumps, and was in less danger of damaging his vehicle. Thus, through the pioneers turning to the right to insure their safety, they started a custom which we have continued to follow.

As a matter of fact, however, does it not seem more reasonable to turn to the left on a crowded street, where the greatest danger is from wheels interlocking?

I should like to hear other reasons for the birth of these customs.

D. M. ORMOND.

PORTAGE LA PRAIRIE, MANITOBA.

EFFECT OF ERRONEOUS DECISION.

To the Editor of LAW NOTES.

SIR: In the March issue of LAW NOTES, on page 233 thereof, among "Cases of Interest," I note that the Supreme Court of North Carolina, in State *v.* Fulton, 63 S. E. 145, held that a statute of that State, passed in 1886, authorized the conviction of a husband for the slander of his wife, overruling a former construction of the same statute by the same court. Justice Walker, however, held that as the crime of which the defendant was charged was committed after a former decision of the court, which held that the statute did not authorize the conviction of a husband in such cases, and before such former decision was overruled, the defendant was in the above case, to quote your article, "entitled to the benefit of the law as it existed at the time of the alleged offense and that the earlier decision of the court protected him." It would seem to me that the law was the same all the time notwithstanding an erroneous decision of the court. Neither the earlier decision nor the case above mentioned changed the law. The law was the same all the time and would have been the same if there was no decision of the Supreme Court. A statute while in force is equally effective at all times. That statute cannot be modified or repealed by an erroneous decision of a court. The primary function of a court is to decide each case as it comes before it, not to interpret certain statutes for all cases. Decisions of courts are only evidence of what the law is. They may or may not be good evidence. Under the theory of Justice Walker courts can practically repeal a statute. They can cause a statute to lie dormant for a time and then revive it at their pleasure. It seems to me that the theory of Justice Walker is contrary to one of the first principles of law, that every one is conclusively presumed to know the law. As the North Carolina statute was the same at all times the law was the same, and, as every one is conclusively presumed to know the law, an erroneous decision of a court would be no protection. The theory of Justice Walker would also involve the question whether it was necessary for the defendant to know of the former ruling of the court. As he was protected by a former decision of a court, would it be necessary for him to show that he knew of such decision?

W. R. HOLLY.

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Law Notes

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Reforms in Reformed Procedure.

LAST month we saw that the constitutional government recently established in Turkey by the Young Turks had developed such intolerably despotic tendencies that a new revolution became necessary in the interest of rational liberty. In the United States the impression is strengthening among the legal profession that the codes of procedure enacted when the common-law system of formalities was strongly intrenched have failed to prevent the growth of a new and possibly worse system of formality. Addressing the New York State Bar Association last January, and suggesting some needed reforms, Everett P. Wheeler, Esq., remarked: "The little pocket code of 473 sections, which was in force when I came to the bar in 1861, has swollen to a big volume of 3441 sections." In the *Illinois Law Review* for April, 1909, pp. 586–588, the editor-in-chief, Prof. Roscoe Pound, comments upon proposals of the judges for reform in procedure, and says that the recent conference of *nisi prius* judges in Cook county, Illinois, is a presage of practicable improvements. "Probably the time for tinkering with the details of practice here and there has passed," he continues; "the near future must see a complete practice act along newer and simpler lines." In another place Professor Pound says: "Our etiquette of justice in this country is the most rigid, the most minute, the most subversive of the ends for which it exists, to be found in any business or industrial communities of the modern world. . . . A very large part of our adjective law is as out of place in a twentieth-century court as gold lace and red coats upon a modern skirmish line." *Illinois Law Review,* January, 1909, pp. 365, 367.

Perhaps the simplest and most satisfactory system of procedure now in vogue in this country is embodied in the Connecticut Practice Act of 1879. This reform was adopted so late that those who promoted it had the benefit to be derived from a study of results in other States and in England, and devised provisions intended to prevent the aftermath of technicality that was liable to follow. See Dunnett *v.* Thornton, 73 Conn. 1, 6.

Husband's Insurable Interest in Wife's Life.

IT seems odd that the question whether a husband has an insurable interest in the life of his wife should be presented as *res nova* to the English courts at this late day. In the United States it seems to be settled that such an interest exists presumptively, at any rate. It is so decided in *Currier* v. *Ins. Co.,* 57 Vt. 496, the court saying that, admitting that a pecuniary interest is necessary, the presumption is, in the absence of proof to the contrary, that the husband has an insurable pecuniary interest in her life. He is entitled to her services. But it is conceded that "cases may exist where the husband has no interest whatever in his wife's life. She may be a burden — a hopeless maniac or invalid; and such facts may require the application of a different rule." The federal Supreme Court states *arguendo* that such an interest exists as a well-known fact. *Conn. Mut. L. Ins. Co.* v. *Schaefer,* 94 U. S. 460.

The English case (*Griffith* v. *Fleming,* noted in London *Law Times* for March 13 last, at p. 427) arose on a policy effected on the lives of husband and wife payable to the survivor, the premiums being paid partly by each. Soon after the policy was granted the wife died, but the insurer resisted payment on the ground that the husband had no insurable interest in his wife's life. The action was tried before Pickford, J., without a jury, and judgment was given for the plaintiff upon the ground that by reason of the value of her services to him, he had an insurable interest. In the Court of Appeal the defendant's appeal was dismissed for the same reason assigned in the Vermont case cited above, that the husband must be presumed to have an insurable interest in the life of his wife.

Abridging Freedom of Speech or of Press by Injunction.

THE Constitution of the United States and its amendments were never intended to be a cover for illegal and unlawful actions. Since *Reynolds* v. *U. S.,* (1878) 98 U. S. 163, it can no longer be claimed that the first amendment to the Constitution affords a defense to one charged with practicing the art of polygamy, although done under the sanction and by reason of the teaching of a religious sect. Neither can it be successfully contended that the second clause of the first amendment of the Constitution, guaranteeing the freedom of speech and of the press, grants to any one a limitless license to say or write what he pleases, regardless of the rights of others. He may write. He may talk. Certainly. But he must be careful, for the moment he passes the line that separates the lawful from the unlawful, the legal from the illegal, the constitutional guaranty countermarches and leaves the offender to be dealt with by the courts of law or the courts of equity, as the exigencies of the case may require.

In the recent case of *The American Federation of Labor* v. *The Buck's Stove, etc., Co.,* 37 Wash. Law Rep.

154, the defendants strongly contended that the injunction restraining them from continuing the boycott against the complainant was an infringement of the constitutional guaranty of freedom of speech and of the press. Granting the jurisdiction of the court to restrain the boycott on the ground that the legal remedy was entirely inadequate and in order to avoid a multiplicity of suits, there can be no doubt that the court had that power to restrain all the acts which went to make the boycott effective. In other words, the court, exercising the powers of a court of equity, had the right to restrain the defendants from publishing or saying anything in furtherance of the unlawful boycott. Otherwise the injunction would have been but an empty farce. In dismissing this contention, Mr. Justice Robb said: "Oral and written declarations in furtherance of a conspiracy are tentacles of the conspiracy and must be treated as such and not as independent acts. It would be an anomalous situation, indeed, if a court of equity, having ample jurisdiction to restrain the carrying out of a conspiracy to deprive a citizen of rights guaranteed him by the Constitution, could be prevented from affording relief by the interposition of such a claim as is here made. Freedom of action is at least as sacred as an untrammeled tongue or pen, and those who conspire to defeat the former right ought not to be permitted to interpose a plea based upon the latter." And Mr. Justice Van Orsdel, in a concurring opinion, said: "It must be remembered, however, that there is a point where the right of free speech and a free press ends, and unlawful interference with personal and property rights begins. When the citizen passes this point, he can no longer claim the protection of the Constitution. . . . A citizen cannot invoke the protection of the constitutional guaranty of free speech and a free press to destroy the right of property secured to his neighbor by the same instrument." Or as more tersely put by Professor Frederic J. Stimson, of Harvard University, while addressing the New York Council of the National Civic Federation in New York city, on April 2, 1909, in referring to the recent contempt proceedings against Mr. Gompers and others in Washington: "The confusion of freedom of speech and freedom to print arising in the case may be dismissed with the word that any one has a right to print what he will, but is afterwards liable for it."

Is the "Black List" Unlawful?

IN this address Professor Stimson declared that the "black list" is unlawful. If by this he meant that the "unfair" list or the "we don't patronize" list published in labor journals is unlawful in itself we are forced to disagree with him. It has long since been settled that laboring men have the right to organize for the purpose of protecting their rights and bettering their condition. And in order to accomplish the purpose of their organization the members of labor unions have the undoubted right to stop working for any employer, that is, to strike. In order to make the strike effective it is the right of the labor unions to place the name of the employer upon the "black" or "unfair" list or on the "we-don't-patronize" list and to refuse to buy his product. In furtherance of their general plan the labor unions have the right to advise their friends not to patronize the unfair employer, and that advice may be given directly or through the medium of the mails. Thus far the "black" or "unfair" list is neither unlawful nor criminal. But as soon as the labor union attempts to enforce its advice by threats or coercion against third parties, its action becomes unlawful. So long as the "black" list leaves all free to act according to their own desires, free to patronize or not to patronize the so-called unfair employer, it is not unlawful; but as soon as it becomes a threat to injure such third parties, should they fail to heed the advice, it becomes unlawful — a boycott. Hon. Reuben B. Silliman, in addressing the New York Council of the National Civic Federation, quoted from a letter written to him by President Taft, as follows: "I am convinced, from long thought over it, that compulsion of third persons against their will is the nub of the offense of boycotting."

Labor unions, however, are not ordinarily so mild in forcing an employer to come to their terms. It was fairly proven in *American Federation of Labor* v. *Buck's Stove and Range Company*, 37 Wash. Law Rep. 154, that when a name was placed on the "we-don't-patronize" list of the American Federation of Labor it was equivalent to a boycott. The course pursued by the defendants through a period of several years clearly indicated that as soon as a name was placed on the "we-don't-patronize" list, all affiliated labor unions were compelled to take immediate action towards making effective a boycott against such person and if need be to boycott his customers. Hence the "black" list of the American Federation of Labor contains an implied threat which clearly marks it as unlawful. The concerted action taken by labor unions throughout the United States when a name was placed on the "we-don't-patronize" list plainly indicated the existence of a combination to prosecute a boycott against any person who was declared unfair by the defendants. Clearly, then, the "we-don't-patronize" list of the American Federation of Labor, with its attendant implications, creates a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. It was earnestly urged that inasmuch as each member of the labor unions might bestow his trade wherever he thought best, a combination of members to do what each might do separately could not be unlawful and therefore the labor unions might lawfully discontinue or threaten to discontinue business intercourse with a given firm and all who handled its product, or, plainly, that the boycott instituted against the complainants was lawful. Mr. Justice Robb dismissed the contention, saying: "To admit the soundness of this contention is to give legal support and standing to an engine of harm and oppression utterly at variance with the spirit and theory of our institutions, place the weak at the mercy of the strong, foster monopoly, permit an unwarranted interference with the natural course of trade, and deprive the citizen of the freedom guaranteed him by the Constitution. The loss of the trade of a single individual ordinarily affects a given dealer very little. Being discriminating, the purchasing public, if left free to exercise its own judgment, will not act arbitrarily or maliciously, but will be controlled by natural considerations. But a powerful combination to boycott immediately deflects the natural course of trade, and ruin follows in its wake because of the unlawful design of the conspirators to coerce or destroy the object of their dis-

pleasure. In other words, it is the conspiracy and not natural causes that is responsible for the result. From time immemorial the law has frowned upon combinations formed for the purpose of doing harm, and we think public policy demands that such a combination as we have found to exist in this case be declared unlawful."

Indicting Corporations for Rebating.

"A CORPORATION," says Lord Hale, "is not indictable, although the particular members of it are," and the observation is adopted by Blackstone, who declares that "a corporation cannot commit treason, felony, or other crime in its corporate capacity." Of course a corporation could not be arraigned in treason or felony, nor in general was the defendant in a criminal case allowed to appear by counsel and the corporation could not appear in person. But, if these technical difficulties had been surmounted, it still remained true that a corporation, having neither soul nor will, could not form an intent, and any crime committed by its agents must have been committed *ultra vires*. The substantive objections to holding a corporation for torts involving malice or for minor crimes have long since been swept away, and the indictments of corporations for both nonfeasances and misfeasances are common enough in our commercial day. It is somewhat surprising, therefore, to find, in the current cases from the Supreme Court of the United States, an attack upon the constitutionality of a federal statute (the Elkins Act) upon the ground that Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution for rebating. *New York Central, etc., R. Co.* v. *U. S.*, 29 S. C. 304. Yet a most ingenious argument to that effect was advanced that thus to punish the corporation is in reality to punish the innocent stockholders and to deprive them of their property without an opportunity to be heard, and consequently without due process of law. It is hardly necessary to say that the argument failed to convince the court. It is said: "It is true that there are some crimes, which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute." In this class of cases corporations may be "held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. . . . We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act."

Fictitious Payees under Negotiable Instruments Act.

SINCE the beginning of the last century it has been regarded as the settled rule of the unwritten law merchant in England and with us that a negotiable instrument payable to the order of a fictitious payee may be treated as payable to bearer, as against parties having knowledge of the fiction. *Minet* v. *Gibson*, 3 T. R. 481, 1 H. Bl. 569; *Bennett* v. *Farrall*, 1 Camp. 130, 180*c*. Usually the rule has been announced in cases where the paper was indorsed in the name of the payee, but proof of the indorsement being of course impossible, it was dispensed with as unnecessary to make title; or in cases where, the drawee having paid the instrument, his right to charge payment against the drawer was in question. Where the payee is admittedly fictitious, the same result may be reached by holding that, though the instrument is payable to order, the maker or drawer is estopped to assert the fictitious character of the payee or to demand proof of his indorsement. In determining whether the instrument is payable to bearer, the character of the payee as fictitious depends, according to the received view, upon the intention of the maker or drawer, and, accordingly, if the drawer intends the payee to be a real person, but, through the influence of an impostor, makes it payable to a nonexistent or fictitious person, the instrument is not payable to bearer, and the drawer may assert this defense. He is estopped only where the paper was purposely made payable to a fictitious payee. *Shipman* v. *Bank*, 126 N. Y. 318; *Armstrong* v. *Bank*, 46 Ohio St. 512. Some authorities, however, in case of an intentionally real but actually fictitious payee hold that the principle of estoppel applies to prevent the drawer from asserting his ignorance of the fiction. The act of drawing is regarded as an affirmation of the existence of the payee and his capacity to indorse, and further to dispense with proof that the indorsement on the instrument is actually that of the nominal payee. *Kohn* v. *Watkins*, 26 Kan. 691; *Lane* v. *Krekle*, 22 Iowa 399 (dictum).

The English Bills of Exchange Act swept away estoppel as an element in determining whether a payee was fictitious, and gives the result of the Kansas case just cited. If the payee is in fact fictitious, the intention of the drawer makes no difference. B. E. A., § 7 (3); *Vagliano* v. *Bank of England*, (1891) A. C. 107; *North and South Wales Bank* v. *Macbeth*, (1908) A. C. 107. The Negotiable Instrument Act adopts the principle of estoppel and makes the intention of the maker or drawer controlling. N. J. L., § 9 (3). Under the act, then, no estoppel to show the fictitious character of the payee in accordance with the drawer's intention can arise by reason of this section. *Seaboard Nat. Bank* v. *Bank of America*, (N. Y.) 85 N. E. 829; *Boles* v. *Harding*, (Mass.) 87 N. E. 481. It may appear at first sight, however, that a different result must follow from sections 60 and 61 of the act, which declare the act of drawing or making to be an admission of the existence of the payee and his then capacity to indorse. Under these sections would not a drawer sued on the instrument as upon a bill payable to order be estopped to deny the fictitious character of the payee and that the indorsement on the bill was his? It might be sufficient to reply that the sections only apply to instruments payable to order, that is, having a personal payee, and, by definition, an instrument payable to a fictitious payee is payable to bearer, and is therefore excluded from the operation of the sections. But some of the cases from which these provisions were codified [equivalent to B. E. A., §§ 54 (2), 88 (2)] were cases of fictitious payees. *Cooper* v. *Meyer*, 10 B. & C. 468; *Lane* v. *Krekle*, 29 Iowa 399. The admission thus made statutory, however, extends only to the existence and capacity of the payee. It does not dispense with proof

of actual indorsement, essential in every case of an instrument payable to order.

The consideration of this aspect of the act is suggested by observations in *Boles* v. *Harding,* (Mass.) 87 N. E. 481, where, however, no possible conflict in the Negotiable Instrument Act is imagined.

The argument has been advanced that the negligence of the drawer of a check in allowing himself to be induced by a third person to insert the name of a fictitious payee, which the drawer believed to be the name of a real person, prevented the drawer from interposing the defense that the payee was fictitious. *Jordan Marsh Co.* v. *National Shawmut Bank,* (Mass.) 87 N. E. 740. The court held, however, that such negligence was not the proximate cause of a payment of the checks so drawn by the banker, and created no estoppel.

To Kill or Not to Kill.

OPPONENTS of the infliction of death as a punishment for murder in the first degree have been rather more than usually active of late, and the legislatures of a number of states have been called upon to consider bills framed with the intention of improving on the Mosaic law with respect to homicide. Most of the bills, as heretofore, have provided for life imprisonment as a substitute for hanging or the electric chair. But in the bill recently under consideration by the Massachusetts legislature it was proposed to give to a jury finding a verdict of murder in the first degree power to qualify the verdict by the addition of the words "without capital punishment." Proposed legislation in Connecticut, after providing for the abolition of the death penalty, went further and put second-degree murders in the indeterminate sentence class, so that the convicted criminal might have an opportunity, if he should reform, to become again a useful member of society.

All of the old arguments and some which appear to be comparatively new have been advanced in support of the various bills. It has of course been pointed out again that the law of England of early times, inflicting death as the punishment for a multiplicity of offenses, did not prevent the commission of as large a number of such offenses as are committed at the present day. The usual argument has been brought forward that statutes punishing murder with death do not prevent the commission of the crime, and the assertion has been made that in the fourteen or more States of the Union which have abolished the death penalty the records compare favorably with those of the States which retain the "law of revenge." Much has been made of the recent execution in the death chair of Mrs. Farmer in New York State, and of the hanging of Mary Rogers in Vermont, and the denunciation of the horrors of killing a woman by law has been vehement. Recent verdicts of a low degree of homicide or of acquittal in cases where the evidence pointed plainly to guilt of murder in the first degree have also been seized upon as proof of a popular sentiment against the infliction of the death penalty.

On the other hand, statistics have been compiled which, if accurate, show that in Maine and Rhode Island, where the death penalty has been abolished, murders are considerably more frequent than in Connecticut, Massachusetts, and the other New England States which retain the extreme punishment. Obviously, however, these statistics in themselves prove nothing. Differences in the character of the population are to be taken into account; it may also be that convictions for murder are more easily obtained, and hence more frequent, where the death penalty is not inflicted than where it is; and moreover, to make accurate deductions possible, the figures should show the comparative numbers of murders in the same State before and after the abolition of punishment by death.

On the whole, the opponents of the death penalty do not appear to have made any marked degree of progress toward attaining their objective point. The Massachusetts bill providing for a "qualified verdict," which may be regarded as a compromise measure, since it would have left the death penalty nominally in force, subject to the discretion of the jury, was defeated in the lower house by a vote of 146 to 54, sixteen members of the legislature pairing off, although two years ago a similar measure was defeated in the house of representatives by only one vote, after it had passed the senate. The closest vote reported was in Minnesota — 35 against the abolition of the death penalty to 31 for it.

But, although such bills be defeated this year and next year, and even the year after that, it seems to us a foregone conclusion that before the lapse of many years more the gallows and other like instrumentalities for the violent elimination of our unfit will come to be regarded with no more favor than the thumbscrew and the rack.

Injury to Child Illegally Employed in Factory.

A VERY common form of legislation looking to the protection of children is that of statutes forbidding the employment of children in factories, or forbidding children under a certain age from being employed over a specified number of hours per week. When, contrary to such a statute, a child is employed and he is injured, a causal connection between the injury and the violation of law being shown, the employer has been held precluded from either contributory negligence or assumption of risk as a defense. *Inland Steel Company* v. *Yedinak,* (Ind.) 87 N. E. 229. On this point the court observed: "Appellant is chargeable with knowledge of the legal disabilities of children to engage in its service, and must ascertain at its peril that a boy employed in the operations of its factory, which has been classified by the legislature as dangerous, is of the required age. The doing of a thing prohibited, or the failure to do an act commanded, by statute constitutes negligence *per se,* the natural consequences of which the master cannot escape on the ground that the employee knew of such disobedience and assumed the risk of injury. This rule of law has been declared most frequently in considering claims for injury resulting from the master's use of some appliance forbidden, or failure to use some safety device required by statute, when the injured servant was lawfully employed. The employment in this case was wholly unlawful, and appellant by employing and retaining appellee in its business while within the prohibited age did so at its own risk, and, it appearing from the facts alleged, that he was injured while engaged in the performance of forbidden duties in the line of his employment, appellant must be held liable for the injuries thus sustained. The employer of a child in violation of a specific statute cannot screen itself from liability for an injury sustained by the child in its service because the injury was occasioned through such negligence, impru-

dence, or childish traits as gave rise to the statute. It follows, therefore, that if appellee was employed and injured, as alleged in the second paragraph of the complaint, under the law he cannot be chargeable either with having assumed any risks of the employment, or with negligence contributing to his injury."

"Fourth of July" Forensics.

THE oratorical belt seems to be moving more and more toward the equator, certainly as far as forensic oratory is concerned. Not only do the pungent epigram and the tear-compelling period seem to have lost their sway in the courts, but it has gone so far that they are positively deprecated. It is stated that Judge Thomas, of the New York Supreme Court, advised certain law students, in a recent address, to eschew "Fourth of July" eloquence and stick to the facts. Shades of Rufus Choate, Erskine, Charles O'Conor, and Seargent Prentiss! Some of the best-loved and most hoary traditions of the bar have to do with wondrous oratory snatching victory from defeat. Even in these degenerate days there are not wanting various treatises or compilations concerning the wit, humor, and pathos of the bar. Sad to say, these works too deal wholly with the bar of days agone, with the wonderful imagery and beautiful figures, the tropes of the elder pleaders. It is not given to our modern Dryasdusts to achieve fame and practice over night by a burning peroration. The times march. One must deal in facts and figures.

Even now, though, there are sporadic cases of oratory. Reporting a recent murder trial in Tennessee, which aroused national interest on account of the prominence of the persons involved, a Memphis newspaper says of one of the counsel:

> "For five hours he swayed his audience as though a thousand unseen electric currents ran from him to them and put them so under his control that they must of necessity respond to his every thought and emotion. They followed his merciless logic with assenting reason, wept without restraint under the spell of his pathos and flamed with redhot wrath when he painted in lurid colors, etc., etc., etc. . . .
>
> "There was not a note in the gamut of human feeling that he did not touch, and when his splendid peroration was ended there was a confident feeling that justice would do her perfect work."

A contemporary tersely remarked that was "going some in the matter of eloquence."

Judge Thomas also deprecated the practice of indulging in intoxicants before going into court. Is it possible that there was in the mind of the judge some idea of cause and effect, or did he merely have Cicero's aversion to loud-bawling oratory and a congenital aversion to drink?

Statute of Limitations in Relation to Amendments.

THE new Code of Alabama of 1907 contains a provision which we commend to the attention of some who purpose to introduce reforms in procedure. Section 5367, which authorizes various amendments of pleadings, provides that new counts or statements of the cause of action "shall relate back to the commencement of the suit, and it shall not be held that such new counts or statements of the cause of action relate to new or other causes of action, so long as they refer to the same transaction, property, and title and parties as the original." At common law a plaintiff could not be allowed to introduce a new cause of action by amendment, and this is the rule under statutes of amendments in most of the States. On the other hand, an amendment which is only a restatement in amplified form of the averments in the original pleading is not objectionable; and, moreover, it relates back to the commencement of the suit so that the statute of limitations cannot be successfully pleaded to the amendment if the period of limitation had expired when the amendment was made. But if an amendment introduces a new cause of action and the defendant interposes no objection, still it does not relate back, and is subject to a plea of the statute of limitations if the bar has attached to it. Under the rules as thus stated, all the court has to determine in passing upon a plea of the statute of limitations to an amendment is the question whether the amendment presents a new cause of action which would not have been allowed had objection been made. In a great many cases this question is not easily solved, and a decision one way or another is frequently made by a divided court. This is alone a deplorable evil, but it is not all. On the principle that "the latitude of amendment allowed the plaintiff cannot be permitted to work injustice to the defendant, or to deprive him of any just and rightful defense," and that "the whole doctrine of relation rests in a fiction of law, adopted to subserve, and not to defeat, right and justice," it was declared in Alabama that an amendment consisting of a "new matter or claim," although not objectionable as an *entirely new* cause of action, does not relate back so as to prevent a defendant from defeating it by pleading the statute of limitations. *Mohr* v. *Lemle,* 69 Ala. 180, and several later cases. Manifestly the perplexities of the court and the probability of fluctuation in judicial opinions are greatly increased by the necessity of determining not merely whether an amendment is permissible and therefore relates back to the institution of the suit, but whether the amendment, although allowable, is of such a character that it does not relate back and entitles the defendant to set up the statute of limitations as a defense. See *Alabama Consol. Coal & Iron Co.* v. *Heald,* (Ala. 1907) 45 So. Rep. 686.

It seems to us that a defendant receives ample justice when the courts exempt him from application of the fiction of relation as to amendments introducing a distinctly new cause of action, and that he cannot rightfully insist that a new class of amendments be carved out solely for his benefit; and apparently the Alabama legislature has expressed the same opinion in the code provision above quoted.

An Erroneous Conviction of Contempt.

A JUDGE'S conviction and sentence of a person accused of criminal contempt in violating an injunction order is sometimes justly and successfully attacked on appeal. In *Garrigan* v. *U. S.,* (C. C. A.) 163 Fed. Rep. 16, it appears that a federal judge in Illinois issued an injunction restraining various trade organizations and individuals from the perpetration of specified disorderly acts in furtherance of a strike of workmen against an employer, and providing that it "shall be binding upon all of said defendants and all other persons whomsoever from and after the time they severally have knowledge of the allowance of this order." Thus the judge strung up a live

wire, so to speak, in the community, and while those who were parties to the proceeding knew all about the location of the wire and the danger of contact therewith, no system of government known among civilized people would tolerate the maintenance of such a dangerous contrivance in the path of "other persons" totally ignorant of its existence. Garrigan, who was not a party to the injunction proceeding, committed various acts which the injunction was designed to prevent. Upon evidence consisting mainly of *ex parte* affidavits — the "most miserable species of evidence," says Bentham — the judge convicted him of contempt and sentenced him to imprisonment for three months, as one who had "full knowledge of the injunction." On a writ of error the Circuit Court of Appeals reviewed the evidence and held "that knowledge of the injunction is unproven, and that no proof appears that the plaintiff in error was engaged by or with any person or association enjoined in its violation," and that "the evidence fails to establish cause for his conviction of contempt of court." Garrigan was unquestionably guilty of riotous conduct in violation of the penal laws of the State, and should have been tried by a jury in an ordinary criminal prosecution. Judges have not yet attained the dignity of legislators whose denouncements of criminal acts are conclusively presumed to be known by everybody.

Proof of Common-law Marriage.

UNDER statutes regulating marriage, requiring marriage licenses, and providing for the proof of marriage, American courts have taken divergent views as to the validity of common-law marriages. In *Kansas* it has been held that such marriages may be proved, although a statute provides for recording marriage licenses and declares the returns and entries in such record to be evidence. *Tyner* v. *Schoonover,* (Kan.) 100 Pac. 478. The court said: "While this statute prescribes what shall be received as evidence, it does not undertake to restrict the proof of marriage to such evidence alone. Consensual or common-law marriages are not void, although the formalities of the statute have not been observed, and these may be shown by acknowledgment, cohabitation, and repute, and must necessarily be shown by other than record evidence. . . . In *New Hampshire,* where a copy of the town clerk's record was made evidence of marriage, it was held that the statute did not operate to make that evidence higher in degree than other evidence, and, further, that other proof might be received without showing that record evidence could not be produced. *State* v. *Marvin,* 35 N. H. 22. In this case, in addition to the testimony by acknowledgment, there was cohabitation, conduct, and general reputation, all tending to show the marriage of the parties." Evidence of this character is "not to be regarded as secondary to record evidence, or to the testimony of one who witnessed the celebration of the marriage. In a *New York* case it was conceded that testimony of the acknowledgment, cohabitation, and reputation might be offered to show marriage, but that under the rule requiring the best evidence such testimony could not be received, unless it appeared that direct evidence could not be produced. The court held, however, that 'the rule which requires the best evidence to be furnished, in preference to that which is secondary, has no application in a sense which will exclude evidence to show, by reputation and cohabitation, that the defendant is a married woman, notwithstanding she may be a witness to prove that fact.' *Rockwell* v. *Tunnicliff,* 62 Barb. (N. Y.) 408."

Denial of Admission to Bar for Want of Moral Character.

THAT was a rare occurrence in legal circles the other day when the Supreme Court of New York refused a license to practice law to an applicant therefor on account of his lack of moral fitness. It is common enough to lock the door after the horse is stolen. Disbarments of attorneys are so frequent as to excite little if any comment. But it so seldom that the courts insist upon moral uprightness as a condition precedent to admission to their bars that an instance of the kind deserves something more than passing notice. The rules for the admission of attorneys in New York State require that an applicant shall produce and file with the court "evidence that such applicant is a person of good moral character, which may be shown by the certificate of the attorney with whom he has passed his clerkship, or by some attorney in the town or city where he resides, but such certificate shall not be conclusive, and the court may make further examination and inquiry." The particular applicant above referred to had been guilty, it is said, of a serious moral delinquency during his student days, in that he had held his marriage vows too lightly. Charges having been preferred against him on this score, the court gave him an opportunity to prove himself innocent thereof, but this, a majority of the court held, he failed to do, and he was denied admission to the bar. Such a decision cannot but have a wholesome effect upon those aspiring to become members of the legal profession. More than that, a precedent has been established which the courts upon whom devolves the duty of determining the qualifications for admission to the bar cannot afford to ignore.

WHAT SHALL WE DO WITH OUR EX-PRESIDENT?

LAWYERS as a class, the legal fraternity, are not given to speaking lightly of the anointed of the People. They have been accused of a degree of reverence for Constituted Authority amounting to fetishism. Consequently, so long as Mr. Roosevelt occupied the apex of the triune powers of the government, the brethren of the brief endured with fortitude his adventitious spankings — they merely wondered.

As evidence of this spirit, the American Bar Association, at its meeting in 1907, squelched a mildly deprecatory resolution anent Mr. Roosevelt's attack on Judge Humphrey. Nor was there any vigorous and organized protest against like onslaughts on his part, though there was a growing sense of the danger of his course, to say nothing of its injustice.

But now that he has left the safe fastness of the presidency for the slight security which convention allows an "ex," it is the privilege of the profession to retort if not in kind, at least with vigor, when he takes a pot-shot at the judiciary. And the profession seems to be doing so and enjoying the doing.

From his newly acquired post as editor, Mr. Roosevelt speaks in a manner which is, if possible, more ex-cathedric than ever before, about some of his experiences as a fledgling assemblyman, experiences had when his ears were still accustomed to the tickle of his college cap tassel.

And from this experience, or rather from his defective recollection of the matter, he gives out a sermon pregnant with warning. Now it is safe to say that unless fathered by some one of either celebrity or notoriety the essay in question would never have reached the public. But such a reboation coming from an ex-chief magistrate, from the man who but lately was the creator of judges and the inspirer of laws, is disturbing. It is not to be classed with the customary railings of the defeated litigant. This utterance, jejune as it is, has commanded wide attention and comment and will, unquestionably, have the adherence of a majority of Mr. Roosevelt's vast personal following, will furnish a text and impetus for those very attacks on the judiciary which he so recently condemned.

The experience in question is as follows: Mr. Roosevelt, then a twenty-five-year-old assemblyman serving his first term, became interested, through a committee appointment, in the question of regulating the manufacture of cigars in tenement houses. He supported a bill urged by the labor unions which was aimed to prohibit the manufacture of cigars in tenement houses and dwellings. The bill, though badly drawn, as Mr. Roosevelt confesses, was passed. Mr. Cleveland, who was then governor, before signing the bill warned Mr. Roosevelt of his doubts as to its constitutionality. The title of this statute (N. Y. Laws of 1883, c. 93) was "An act to improve the public health in the city of New York, by prohibiting the manufacture of cigars and preparation of tobacco in any form, in the tenement houses of said city." The body of the act extended the prohibition so as to include the manufacture "in any rooms or apartments . . . used as dwellings for the purpose of living, sleeping, or doing any household work therein." A test case was speedily brought under the act (*Matter of Paul,* 94 N. Y. 497). It was held that inasmuch as the title was limited to "tenement houses" in a certain city, a class of buildings known to and defined by the law, whereas the body of the act included dwellings as well, the act was unconstitutional as being in violation of the constitutional provision that no private or local bill shall embrace more than one subject and that shall be expressed in the title. (N. Y. Const. 1846, art. III., § 16.)

This provision is so well known to lawyers, it is one so generally found and applied in the various States, and so salutary in its operation, that it is difficult for a lawyer to see how the New York court could have failed to apply it in the foregoing, falling, as the act did, squarely within the inhibition of the constitution.

But what does Mr. Roosevelt say? "The judges invoked a technical construction of the constitution in order to declare invalid a law deliberately enacted by the legislative body; a law which I firmly believe it was entirely in the province of the legislature to pass. Every consideration of public morals and public weal demanded that it should be declared valid." (*Outlook,* March 13, 1909, p. 564.)

The "judges invoked"! He speaks as if the court had crept softly up with an unsuspected constitutional provision concealed on its person and hurled it as a deadly weapon against the poor and downtrodden, while, as a matter of fact, the point was one raised in the briefs of counsel.

From this experience he deduces the principle that the judges should know the people. The principle, as a principle, sounds very large and fine. But when, as in this case, Mr. Roosevelt's application of the principle requires that to know the people, they will ignore the constitution, it becomes wobbly. The judges are supposed to heed their oath of office.

However, no one will cavil at the ethical views of Mr. Roosevelt on this question, even if his concrete illustration would seem to require the courts to know some at the expense of others. His argument would, perhaps, have been stronger if he had based it, as Dr. Abbott and Mr. Jerome sought to do for him, on the Jacobs case (98 N. Y. 98), in which case the ruling of the court was as to the propriety of the exercise of the police power, and wherein the court was bound by no hard and fast constitutional provision.

The contention is that it is unbecoming and unwise, to say the least, for a man whose position commands for him such a wide and often undiscriminating following, to make such a gratuitous attack on the administrators of justice as a class, respect for whom is one of the foundations of proper government.

If there is an abuse which he feels requires correction, it would be much more helpful, much less dangerous to law and order, if he were to present it after due reflection and in a proper form. There are so many subjects, ranging from the solar system to the rotation of crops, which may properly engage his versatile activity, that lawyers may with reason beg him to hold off from the administration of law until he approaches it with mature views and proper information.

BASIL JONES.

CONSERVATION OF NATURAL RESOURCES.

Two recent judicial utterances on the power of a State to regulate the doing of acts on private lands without compensating the owner of such lands for any loss occasioned thereby have a special interest at this time because of the popular movement for the conservation of natural resources.

The elementary rule of law that private property shall not be taken or damaged for public uses without just compensation is of course to be considered in connection with that other elementary rule of law that all property within a State is derived directly or indirectly from the government and held subject to those general regulations which are necessary for the common good and general welfare. *Com.* v. *Tewksbury,* 11 Met. (Mass.) 55, wherein Shaw, C. J., said: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

The Maine senate, having in mind the power of a State to legislate for the general prosperity of the people, but being in doubt as to the extent of the power, requested the Supreme Court of Maine to give to the senate their opinion on the following question, among others, to wit: "In order to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving, and maintain-

ing the natural water supply of the springs, streams, ponds, and lakes, and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds, and lakes, and as an efficient means necessary to this end, has the legislature power under the constitution by public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land, by the owner thereof, without compensation therefor to such owner?" All of the justices with the exception of one, who declined to give an opinion for constitutional reasons, were of opinion that the proposed legislation would be within the legislative power, and would not operate as a taking of private property for which compensation must be made. The court said: "While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, it would nevertheless leave him his lands, their product and increase, untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation." See *Opinion of the Justices,* 103 Me. 506.

Considerable comment has arisen on account of a recent decision in New York which declared constitutional in part a statute entitled "An act for the protection of the natural mining springs of the State, and to prevent waste and impairment of its natural mineral waters." It would appear that at the time this statute was passed at least one company at Saratoga Springs was pumping from wells upon its lands great quantities of mineral water, for which Saratoga is noted. This mineral water holds in solution not only natural mineral salts but an excess of carbonic acid gas, and it was for the purpose of extracting this gas for the market that the pumping was done. The mineral water was then allowed to go to waste. The part of the statute which is material to the facts stated above, in effect forbids accelerating or increasing the flow of percolating waters or natural carbonic acid gas, from wells bored into the rock, by pumping or any artificial contrivance whatever, when the object of so doing is to extract and collect carbonic acid gas for the purpose of marketing the same. In *Hathorn* v. *Natural Carbonic Gas Co.,* 87 N. E. 504, the Court of Appeals (one judge dissenting) decided that this part of the statute was constitutional, and affirmed an order of the lower court restraining a corporation from doing what the statute prohibited. The court said: "It was entirely proper for the legislature to adopt the provision in question defining and regulating the rights of persons desiring to use mineral waters like those at Saratoga Springs, and calculated to prevent such use thereof as would . . . result in waste of natural resources of the land to the injury of general and public interests." Judge Haight, the dissenting judge, differed from the majority on the ground that the statute did not attempt to regulate and preserve the production of the mineral waters of Saratoga Springs in order that the public might enjoy the medicinal properties contained in such waters, but absolutely prohibited throughout the entire State the pumping of waters from wells drilled into the rock for the purpose of extracting the carbonic acid gas contained therein, excepting only the salt reservation at Syracuse and the counties adjoining. On the larger question of whether the State of New York might regulate the taking of mineral waters at Saratoga Springs by appropriate legislation, Judge Haight had this to say: "While the mineral waters of Saratoga Springs are not used for domestic purposes nor to aid vegetation, they, however, possess medical properties which are valuable, and the State, for the benefit of the whole people, may by statute regulate the production of such waters, to the end that the natural springs may be preserved from contamination or destruction. Take, for instance, the springs of Carlsbad, Wiesbaden, the hot springs of Arkansas and of Virginia, the springs of Mt. Clemens, as well as those of Saratoga, which are visited annually by thousands of people and some of whose waters are bottled and shipped broadcast over the land, and are used by thousands upon thousands of our inhabitants for medicinal purposes. Surely the State under its police powers may, in the interests of the people, protect such great gifts of nature to mankind. I am, therefore, fully in accord with the views expressed by Judge Hiscock in that portion of his opinion in which he discusses the police powers, and reaches the conclusion that the legislature may, by statute, regulate the use."

It should be noted in connection with the New York case that the court gave weight to the fact that the common source of supply was affected by the increased flow of water caused by the pumping apparatus installed by the defendant. From this standpoint the case is like several which have been decided in recent years, based upon the decision in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190. In the words of the court in *Ex parte Elam,* (Cal.) 91 Pac. 811, the decision in the United States Supreme Court established "that water, oil, gas, and all fugitive substances held in their natural subterranean reservoirs are exceptions to the general rule establishing absolute ownership in the proprietor of the surface of all that lies underneath; that these minerals, being migratory in their nature, having no fixed situs, are a part of the soil only so long as they are on or in it, but after they escape and go to other lands the title of the former owner is gone; that it follows therefore that no one owner of the surface of the earth within the area beneath which these minerals move can exercise his right to extract from the common reservoir in which the supply is held without diminishing the source of supply as to which all other owners of the surface must exercise their rights; that, in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all, and of the public at large, the State could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein they were deposited, as well as the public, had an interest."

The effect of these latest judicial utterances considered above will doubtless be further legislation in the different States on the subject of conservation. If such will be the effect they should be hailed with delight by the great mass of American people who have at heart the common good as against private greed and short-sighted commercialism.

H. N. Eldridge.

The reason and spirit of cases make law; not the letter of particular precedents. Lord Mansfield, in Fisher *v.* Prince, (1763) 3 Burr. 1364.

THE SPORT OF UNCROWNED KINGS.

"They sought it with thimbles; they sought it with care;
They pursued it with forks and hope;
They threatened its life with a railway-share;
They charmed it with smiles and soap."
— *Hunting of the Snark.*

HORSE-RACING may be a good enough sport for kings of the Divine-right variety. It is far too tame, however, to satisfy those of our uncrowned kings who are wont to "view with alarm," "point with pride," and (when Fortune smiles) draw a *per diem and* mileage. These guardians of the palladium of liberty, whose hearts beat only for the common people, must needs show their mettle by doing battle with the titanic minions of predatory wealth, just as a knight-errant of the olden days, who wished to ease his soul of some slight vow or succor a damsel fair, used to engage a frightful giant in single combat. For them the quest of the godless trust; the relentless pursuit of vested interests; the bearding of the money devil in his Wall-street lair; the hunting of the capitalistic snark.

Of late years our legislators have developed a tendency, at once amazing and alarming to thoughtful citizens, to bait corporations, particularly those whose business is affected with a public interest, and to treat corporations in a manner widely different from that in which individuals having similar interests are treated. Nor have they been without support in their course. A spirit of unreasoning antagonism to corporate wealth and corporate power has grown up among certain classes of people, and has been carefully nursed by sensational newspapers and unscrupulous demagogues. The newspapers do their part by distorting and coloring the news, and publishing inflammatory editorials and cartoons designed to array class against class: the demagogues do theirs by making flowery speeches denouncing corporation managers as oppressors of down-trodden humanity. Thus it is that "trust-busting" has become at once a pleasant amusement and a profitable occupation for many of our politicians. In other words, some of the sportsmen at least are professionals and not amateurs: they derive profit as well as amusement from the sport. As a matter of course, they invariably profess to be entirely disinterested, but frequently we are forced to admit that their professions are disingenuous, and occasionally we are reminded of Dr. Johnson's sage observation that "patriotism is the last refuge of scoundrels."

One of the strange features of this emotional crusade is that it is directed, not against wealth, but against corporate wealth; nor against the power of a dollar, but against the power of a dollar in the hands of a corporation. It seems to be considered that some mysterious law of nature operates to make a corporation organized to own a corner grocery more dangerous to the community than an individual who is "rich beyond the dreams of avarice," even though the individual has a thousand times as much money as the corporation, employs a thousand times as many men, and has a thousand times the capacity, the incentive, and the inclination for breaking the law.

As Mr. Edward M. Shepard said in an address delivered before the Illinois Bar Association: "The jealousy against power, and especially centralized power, which in earlier days was directed against government, the fear of executive or federal usurpation which was dominant in our own country for the half century from the end of the first Adams' administration until the interests of negro slavery dominated our politics — these to-day give place to jealousy of corporations. A good American used to dread George III.; to-day he dreads the Standard Oil Company. And it is not mere wealth, but distinctively corporate wealth, which is in his mind. Popular jealousy of enormous personal fortunes, like those of the late Marshall Field or Russell Sage, or the Astor family, is not acute. Even when they and other possessors of such fortunes do not wistfully and by profuse munificence, after the fashion of Mr. Carnegie or Mr. Rockefeller, appeal for popular condonation of the offense inherent in the very fact of their wealth, even then the jealousy is tepid compared with that incurred by fortunes which, like Mr. Harriman's or Mr. Ryan's, concretely signify actual control of great corporations."

It must not be thought that the zeal of our watchful legislators is directed against all corporations and all trusts. It would not be fair to them to injure their standing in union-labor circles by making such an assertion. Their activities are confined to corporations having a capital stock, assets, and a capacity for being held liable for their contracts. Some may say that a labor union is not a trust — that it is merely a defensive combination for mutual protection against superior force. It is of course true that a trust cannot be successful, or at least powerful, unless the commodity in which it deals or upon which its business is based is one of limited production, capable of absolute control. It is equally true that though labor is a commodity, few, if any, labor combinations answer this description. On the other hand, the sinews, if not the brains, of labor unions have been so successful in smashing natural laws (and incidentally non-union skulls) that a well-organized union may in all fairness be called a trust.

Anti-trust legislators, however, are careful not to do the slightest thing to restrict the rights of labor trusts. Indeed, they are as energetic in increasing the power of labor trusts as they are in curtailing the power of other trusts. The reason is perfectly plain: the votes of the members of the average labor union outnumber the votes of the stockholders of the average corporation.

There can be no doubt, of course, that every unjust legislative enactment, whether it affect corporations or natural persons, property or liberty, works an injury to our institutions and operates as a direct menace to our freedom, so long as it is allowed to stand. If the unjust statute be one concerning a corporation, its injurious effect consists not merely of the fact that it ignores the legal rights of the corporation — a rich and powerful one, if you please — although that is bad enough — but of the much worse fact that every rent made in the garment of our liberty weakens the entire fabric. The same lawless spirit that gives birth to a disregard for the lawful rights of corporations will in time, inevitably, under the operation of an inexorable law of nature, breed habitual disregard of the rights of all classes — disregard of all rights. The dog that has learned to suck eggs cannot be trusted to leave his master's untouched.

This it is that discourages thoughtful lovers of liberty and causes them to doubt the permanency of our boasted freedom, when they reflect upon the vicious class legislation which has become all too common in the last few

years. They may well take courage, however, when they consider the fearless manner in which our courts discharge their constitutional power and duty of restraining the other departments of the governments from abusing their power. The courts, unmoved alike by public clamor and executive impertinence, proceed upon the old-fashioned theory that the validity of a statute is to be tested by accepted legal principles — that it must stand or fall according as it conforms or fails to conform to these principles, irrespective of whether it affects a corporation, a labor union, or a mere private citizen who neither owns a capitalistic trust nor is owned by a labor trust. They consider a corporation as good as a natural person, before the law, and a labor union as no better, and refuse to uphold legislation induced by passion, prejudice, or politics, which offends against the organic law.

The courage displayed by our judges in matters affecting capital and labor, and the difference between their attitude and that of some of our legislators, are well illustrated in some forcible remarks made by Judge William J. Wallace shortly after his retirement from the federal bench. At a banquet given in New York, Judge Wallace, in commenting upon the action of Judges Evans and McCall in declaring the Federal Employers' Liability Act to be unconstitutional, said: "I deprecate and denounce the attempts made recently to censure federal judges because they have seen fit to hew straight to the line of their duty as judicial officers. Only a day or two ago there appeared in a Western newspaper severe criticism of a federal judge because he had the temerity to declare unconstitutional certain acts of Congress relating to labor. Who are these men that they should dare to assert themselves against the opinions of the constitutional lawyers of the Senate and the House of Representatives? I want to tell you that every constitutional lawyer I ever met knew nothing about anything else. I agree with the idea that no judge should declare a statute or any Act of Congress to be unconstitutional unless it is palpably so. But I deplore and I despise the man who in such a case would prostitute his office because of lack of courage. Who can find among the members of Congress any who would dare to stand up and oppose a labor measure supported by labor unions?"

No candid man will deny that many corporations have abused their privileges and broken the law. No sensible man will deny that the abuses should be checked and the breaches of the law punished. But the innocent should not be made to suffer for the sins of the guilty. It will not do to assume that the successful manager of a corporation has broken the law. Even if he has accomplished what we thought of doing but gave up as being impossible, let us not accuse him of tricking the law, but rather let us concede that he may owe his success to the fact that the Lord helps those who help themselves. As Dr. Johnson hath it: "Words are men's daughters, but God's sons are things."

The sum and substance of the matter is that corporations are discriminated against merely because they are corporations, and that the unjust discrimination should cease, not merely because it injures the corporations, not merely because it is right that it should be stopped, but because its tendency is to injure the whole body of the people and threaten their liberty. As to the corporations themselves, the unlawful ones should be made to obey the laws. Even those which have kept strictly within the law would probably find that it would increase their popularity and smooth their paths to give reasonable publicity to their affairs. They would do well to follow the example of Alcibiades, who cut off the tail of his dog in order that the Athenians might say that of him rather than something worse.

JOHN C. MYERS.

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LOPPING THE LIMITATIONS.

CONSTITUTIONS are the work of the people, not of legislatures or of courts. The people give and the people take away constitutional provisions.

The functions of constitutions are to limit and define the scope and prescribe the manner of official or public action. Constitutions stamp public officials as functionaries and servants, coupled, however, with an interest, clothed with discretion, guarded by an oath, and separate their sphere of action into departments. A constitution is the unquestionable certificate of the supremacy of the collective people in state and nation, and at the same time it stands as an insurmountable barrier against wild and clamorous encroachments by the people themselves upon vested private or public rights. Were it not for the checks and limitations in constitutions public officials would soon cease to regard themselves as mere servants, and instead they would actually become high dignitaries wielding arbitrary and unchallenged power and authority in regard to things and in places where they ought only to serve and minister.

Limitations in the constitution were made to accomplish just *that* object — to curtail and limit. Whenever we are confronted by constitutional obstacles, it is proof that the document has not become obsolete, as is so often claimed as an excuse for ignoring it. The wisdom of the founders of the government, taught by the experience of the past, foresaw that unless both officials and people were restrained by proper constitutional checks they would likely become arbitrary and oppressive in furthering their own private ends, to the injury of both public and private rights. Lop off the limitations, and constitutions lose their usefulness and effect. Whenever a constitutional limitation is torn down, the people lose and some official usurps the power formerly withheld, and the toleration of the usurpation serves as a precedent for further vandalism upon the constitution.

At no time in the history of the country has there been greater need for patriotic vigilance than now to stem the growing evil of overriding constitutional limitations. Every lawyer, when he is admitted to the bar, takes an oath that he will support the constitution of the United States and that of his own State. He should be true to this oath, for it really devolves on the lawyers to defend the country against this insidious domestic danger.

There is a growing doctrine, openly indorsed by the President of the United States, to enlarge the Federal Constitution by judicial construction. This pernicious idea is sought to be justified by argument that it is too cumbersome and difficult to amend or change the Constitution in the usual and recognized way, and that unless a shorter cut is taken certain policies cannot be so well carried out, and that political and business interests are likely to suffer under existing conditions. That certain changes in or amendments to the Constitution would be right and proper may be true, but to change or amend it

otherwise than by the constitutional method is to destroy it altogether.

At the very threshold of the new administration a time-honored and salutary prohibition contained in the Constitution of the United States was openly disregarded by the President in naming, and by the Senate in confirming, Mr. Knox — constitutionally ineligible — to the cabinet position of secretary of state. The provision is:

"No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time."

Mr. Knox's term of office as senator from Pennsylvania had not expired when he was appointed, and he was a member of the Senate when the salary of the office of secretary of state was increased. At the time this increase in salary was provided for, Mr. Knox, without doubt, knew that he was to be chosen as a member of the new cabinet, and that he was to be made secretary of state. The fact that the salary was reduced again cannot help the matter. The people of the United States are interested in preserving the Constitution in letter and in spirit. They did not begrudge Mr. Knox the few thousand dollars increase in salary. If this constitutional provision can be disregarded, then why not every other?

The Federal Constitution is a grant of power. Strict constructionists have always contended that the power conferred by the States and by the people, through the Constitution, upon the federal government, is limited to the grant, and the earlier decisions of Chief Justice Marshall, laying down the doctrine of "implied powers," were received with a great deal of misgiving and disapproval. This doctrine is claimed to be invoked, among other instances, in the regulation of the so-called trusts, by federal authority, by a process of enlargement of the Constitution by judicial construction. This would stretch the clause under which so much has been held to be authorized — the interstate commerce clause — out of all shape, and is tantamount to tearing down all the limitations on the power of the federal government. Besides, interference with private business or interests, whether carried on by natural persons or corporations, when not infringing other public or private rights, could not rightfully have been authorized by the Constitution. Anti-trust legislation, or worse, trust regulation, as an administrative matter, is extremely near the border line of another constitutional limitation, viz., that no one shall be deprived of his rights of property without due process of law. Every person, natural or corporate, should have the right to do as he pleases with his own, provided his actions do not tend to impair any public right or any other person's natural rights. The governmental authority cannot rightfully deter, retard, or hamper any private business with statutory prohibitions or restrictive regulations. When any private business ceases to be competitive, and becomes monopolistic, and if the business or commodity monopolized is a public necessity, then, on the theory that government owes to the people the furnishing of public service and necessities at cost, it would be within the scope of governmental power to take over and itself operate the business so monopolized, or else proceed upon the idea that the person so operating the monopoly is the delegate of the State in such business, and hence subject to all such restrictions and regulations as will prevent him from realizing a margin of profit on the same, or otherwise appropriating rights due to the public from government. This would naturally put a stop to artificial monopolization, for to do so would be but an automatic elimination of the private monopolist, and then there would be no need for regulation. But to treat a business as *private*, and then to interfere with its operation, by way of regulation or restriction, is unjustifiable, either under the Constitution or on the broad basis of natural justice. Anti-trust statutes have been sustained by decisions of the courts, it is true. These and similar decisions are only further instances of lopping the limitations of the Constitution. The common public do not ordinarily notice or appreciate the full force of a court decision which tends to override a constitutional limitation. Very often, too, the facts in a particular case warrant vigorous rebuke; or the decision is a concession to demagogic and radical clamor of a political party or faction in popular favor, and then, no matter how far-reaching or vicious in principle the decision may be, it is received with fulsome praise. The potentiality for evil of such a decision is usually not discovered by any one until afterwards, when it is pointed to as a precedent to justify the final destruction of a limitation, in all probability aimed at all the time.

All legislative power of the federal government is vested in Congress, and in addition to the enumerated powers the Congress is authorized to make all laws which shall be necessary or proper for carrying into execution the powers conferred. The people as well as officials become restive under legal restraint when confronted with the existence of abuses. If the proof could be obtained, and courts fearlessly did their duty under the common law, or by imposing the statutory penalties, these, in many instances, could be restrained and corrected. This being uncertain, the limitations of the Constitution are ignored and radical legislation is demanded to supply what incapable or dishonest officialdom has neglected. As if it would be more effectual, the demand is nearly always made on the Congress of the United States. In cases where the relief demanded is of a character not really within the constitutional power of Congress to grant, especially if the measure demanded can be used to political advantage, the side-stepping begins. If there is no other way open, the interdicted subject-matter is committed to a board or commission, called an administrative body. Such action is sought to be justified under the constitutional provision that Congress may make all necessary and proper laws to carry its conferred power into execution. In truth and reality, however, such work is usually an unauthorized delegation of power. It is not disputed that there are functions which are merely ministerial and administrative, and these may properly be committed to boards or commissions. There are some things which it would be wholly impracticable for Congress to attend to itself, though it had the power and authority. When such things are performed through the agency of commissions or boards thereunto delegated, acting in a subordinate and advisory capacity, no legal criticism can be made, but when such commissions are clothed with functions and powers beyond those possessed by the parent body, the Congress itself, they cease to be advisory and administrative bodies, and become anomalous. When such boards combine the attributes of the three co-ordinate branches of the government, and when the result of their operations is approved by the courts, immediate emergencies may be speedily and advantageously met, yet in the end it proves to be a part of the same old process — lopping the limitations.

The Federal Constitution provides that "the United States shall guarantee to every State in this Union a republican form of government." Right or wrong, this provision is emphatic in its terms, and, until changed in the regular way, should be respected in spirit as well as in letter. Option legislation on general subjects, or the so-called referendum principle, becoming so common in many states, in tendency is counter to this limitation. Local option laws with respect to the sale or manufacture of intoxicating liquors, and the like, in particular localities are perhaps distinguishable from laws on other and general subjects, for these have been classed as falling within

the proper exercise of the police power, which, of course, does not depend on constitutional authority, strictly speaking.

Another evidence of the tendency of the time to disregard the constitutional landmarks may be found in State statutes authorizing certain cities or municipalities to adopt a novel form of city government, commonly known as government by commission. The adoption of the authorizing act, as well as the putting away of the old existing form of government, is made to depend on receiving a majority vote at elections in the municipalities falling within the classes to which it applies. This becomes more striking in States where the constitutions provide that cities, towns, etc., shall be organized and governed by general law to be provided by the legislature. The enactment of such laws can surely not be justified as being a mere delegation of the police power, not constitutionally conferred on or vested in the legislature, and so not circumscribed by constitutional limitations. Neither can it be claimed that because municipal bodies are themselves, for the most part, merely administrative machinery, the course is simply the supplying of administrative and supplementary procedure for effectuating direct legislative provision. As already observed, in many States, by constitution it becomes the duty of the legislature to organize and provide for government of such municipalities by the exercise of its own constitutionally vested legislative power, which it may not delegate.

Optional legislation on general subjects, and especially with reference to the government of cities of a certain class, under constitutions which provide that cities, towns, and villages shall be organized under and by general law, and that general laws shall have a uniform operation, etc., naturally opens the door to an almost limitless field of argument on the subject of arbitrary and capricious classification, generally denounced by all the courts, except in the instances of very recent date to be alluded to below. (See the exhaustive monographic note to State *v.* Ellet, 21 Am. St. Rep. 78.) It must be obvious to any one, if a State legislature should itself undertake to enact and specify that a certain general law was to apply in particular cities or localities, and not in other cities or localities belonging naturally in the same class, and presenting no inherent municipal differences, that this would not be permissible. Especially so in those States where the constitutions provide that organization and government of cities, etc., shall be provided for by the legislature by a *general* law. To say that this end may be accomplished by submitting the proposition to the voters of such cities or localities for rejection or acceptance is equivalent to saying that legislatures may accomplish by delegation what they are powerless to perform by themselves; or, worse yet, that the localities, by localities, and not the constitutionally authorized and intrusted body — the legislature — may prescribe the general rule of action in a State.

Laws for the organization and government of cities, such as above referred to, exist in at least three States — Iowa, Texas and Kansas — differing, perhaps, in detail and minor particulars, in the main of the same character, from option legislation on general subjects. In Iowa and Kansas the Supreme Courts have upheld the law as constitutional. The Iowa decision, Eckerson *v.* City of Des Moines, 115 N. W. 117, has been characterized as being "a labored attempt, by special pleading, to uphold a statute when the court apparently felt it ought not to do so." The Kansas case, Cole *et al. v.* Dorr, as City Clerk, has not yet been reported. The case has been decided, and the validity of the law has been sustained, but the opinion of the court has not yet been written. It seems as if, in response to the tendency of the time, many modern courts are bent on bringing about, in spite of the constitutional limitations, just what such men as Madison and his contemporaries feared would be the result, if not properly restrained and safeguarded by constitutional restrictions and limitations.

The recall principle is usually associated in the minds of many with the referendum, but it is in fact an entirely different measure, having little in common with the referendum. That the people should be provided with a "string," so to speak, with which to bring unfaithful officials back to their sworn duty, or else relegate them to private life, cannot infringe any fundamental law or private right, any more than other ouster proceedings existing, or which might be provided, would be violative thereof.

Let no one conceive the idea, however, that to obviate the constitutional provision that the United States shall guarantee to the States a republican form of government, or to construe away the other limitations ordained and established as a part of the Constitution, is to make what is left more democratic. This would be a serious mistake. Those who are most active in obliterating and destroying the constitutional limitations are not interested in the principles of democracy, except, if possible, utterly to eliminate them. Unthinking theorists may be earnest, as well as honest, in advocating measures such as the "initiative and referendum," and other delegation of constitutionally vested power, but their efforts are inconsistent with the spirit and also the letter of the Federal Constitution, and what there is left of that should be zealously cherished, treasured, and defended as the certificate of American liberty.

GEO. W. and M. C. FREEKS.

A RECONSTRUCTION JUDGE.

IN connection with the death of former Judge Thomas J. Mackey, of South Carolina, *The News and Courier* of Charleston, S. C., reproduces a characteristic charge delivered by him from the bench, illustrative of his methods and of conditions in South Carolina in reconstruction times. A Republican member of Congress named A. S. Wallace had given a note for $200 as part payment for a biography of himself, published by some hack writers. It was a favorite weakness of the scalawags, carpetbaggers, and shabby adventurers who ruled the State to pose as old-time South Carolina gentlemen. When Wallace made the note he was asked what interest should be stated in case of his failure to meet it at maturity. He answered grandly that if he failed to pay promptly interest might be charged at three per cent. an hour. The note was so written. When it was overdue five years an ingenious and painstaking lawyer calculated that Wallace owed his biographers $93,000 and brought suit for that amount in Judge Mackey's court. The judge in his charge said the evidence showed that the biographers had described A. S. Wallace as a patriot, a Christian, and a gentleman and thereby had damned themselves hopelessly and inevitably. He quoted Scripture to prove that the whole world is inadequate compensation to a man for the loss of his soul. Therefore, the sum claimed by the biographers was moderate and he directed that the foreman of the jury come to the desk and sign a verdict for the full amount. Mackey at that time was a Republican, but, as may be guessed from his charge and comments, his feeling toward Representative Wallace was not cordial.

Mackey was one of the smartest and most reckless of the reckless adventurers developed by reconstruction, and the Palmetto State is full of stories and memories of him, says the Richmond *News Leader*. It was he who announced, either from the bench or in a public speech, that he had made careful investigation and discovered that Franklin J. Moses, Jr., was a lineal descendant of the impenitent thief of the Crucifixion.

Discussing the habit of "Tharsparilla" Wright, the lisping Philadelphia negro who was an associate justice of the Supreme Court, of getting drunk and preaching in the Columbia barrooms, Judge Mackey said he had investigated Wright's ancestry and accounted for his inebriate piety by the fact that his remote ancestor on the banks of the Congo had, single-handed, eaten a very devout Wesleyan missionary, thereby acquiring religious tendencies which he transmitted to his posterity.

Judge Mackey, although a native of Charleston, was fond of amusing himself with the peculiarities of that ancient and respectable city. On one occasion he described dramatically the finding of a dead body at a point equally distant from Charleston, Augusta, and Columbia, and how a post-mortem discovered that the stomach of the corpse contained three grains of rice and a spoonful of cistern water, whereupon the coroner promptly shipped the body to Charleston as being proved by the evidence unquestionably to belong there. Another of his stories was that he had been forced to flee from Charleston while yet a youth because he had inadvertently remarked that in the world there were steeples taller than St. Michael's. In the year of the revolution, 1876, he "crossed Jordan," as the process of going over to the Democrats was described, and became one of Hampton's most effective, unscrupulous, and daring supporters. He announced his change of heart by riding into a public meeting at Edgefield on an ox and wearing a red shirt. Going down to appear before the Supreme Court in support of one of his peculiarly outrageous opinions, favoring the Democrats, he told the people who gathered at a station to hear him talk that he intended to present to the court thirteen conclusive reasons in support of his position, which reasons he had then on his person. Whereupon he produced and exhibited two six-shooters and a bowie knife. He was the originator of the assertion that the Republican party had seven distinct principles — five loaves and two small fishes.

Probably no more brilliant man ever sat on the bench anywhere. When he was made a judge he never had practiced law, and so far as can be ascertained never had studied it. Yet he always could find law for any decision or ruling he saw fit to make. If he couldn't find it he invented it as he went along. His impulses were good, he was a fighter from the heart, and he had a way of arriving at substantial justice by the most absurd routes. He delighted to say the wildest and most ridiculous things with an air of profound gravity and intensity. He was a born actor, and love of applause was, perhaps, the ruling passion of his life. Perhaps there have been and are other men like him, but for the full development of a character and characteristics like his stress and turmoil and times of intense passion and strong crisis are needed.

Cases of Interest.

VALIDITY OF CONTRACT OF ATTORNEY AND CLIENT AGAINST COMPROMISE BY CLIENT. — In Beagles *v.* Robertson, 115 S. W. Rep. 1042, the St. Louis Court of Appeals holds that a contract between an attorney and his client to the effect that the attorney shall be paid a certain percentage of the recovery and that the client shall not make any compromise or settlement of the suit without the attorney's consent, is valid and enforceable under the Missouri Attorneys' Lien Act. This statute is copied largely from the New York statute, in which State such a contract has been held invalid as opposed to public policy.

POWER OF COMMISSION TO COMPEL CARRIER TO INSTALL TELEPHONE. — In Atchison, etc., R. Co. *v.* State, 100 Pac. Rep. 11, the Supreme Court of Oklahoma sustains an order of the State corporation commission requiring the appellant railroad company to install and maintain a telephone in its depot at a certain town. By the State constitution the corporation commission is given power to require railroad companies "to establish and maintain all such public service facilities and conveniences as may be reasonable and just," and it is held that the telephone is a facility or convenience within the meaning of this provision.

FAILURE OF AUTOMOBILE DRIVER TO LOOK BACK FOR STREET CAR AS CONTRIBUTORY NEGLIGENCE. — In Baldie *v.* Tacoma Ry. and Power Co., 100 Pac. Rep. 162, the Supreme Court of Washington holds that the driver of an automobile running the machine, which is equipped with a red rear light, along a street car track on a city street, is not guilty of contributory negligence, as a matter of law, in failing to look back in time to see an approaching street car and avoid being struck thereby. It is held that the duty of the chauffeur to look ahead is paramount, and that the red light on the rear of the automobile is a warning upon which the driver has a right to rely for protection from cars and vehicles coming from behind.

LITERARY PROPERTY IN MANUSCRIPT DRAMA. — In Frohman *v.* Ferris, 87 N. E. Rep. 327, the Illinois Supreme Court holds that while there is no provision in the United States copyright statute for securing to the author of a drama in manuscript form the exclusive right to present it, he has at common law an absolute right to his production, so long as it remains unpublished, which he does not lose by public presentation, and that although under the statutes of England, where the play has been presented, the public presentation of a manuscript drama extinguishes the author's common-law rights, such presentation does not affect the author's rights in the United States.

LIABILITY OF TELEPHONE COMPANY FOR INJURIES BY LIGHTNING ENTERING HOUSE BY WIRE. — In Southern Telegraph and Telephone Co. *v.* Evans, 116 S. W. Rep. 418, the Texas Court of Civil Appeals sustained a recovery against a telephone company for personal injuries caused by lightning passing over the company's wire into a residence where one of the company's telephones was installed. There was evidence tending to show that the defendant's lightning arrester was incomplete and ineffective by reason of the absence of a ground wire at the residence. The court in refusing to disturb the judgment holds that a telephone company is bound to use due care in selecting and maintaining such approved appliances for the arrest of lightning as are reasonably necessary to guard against injuries from that cause.

DEED WHICH WITNESS DENIES EXECUTING AS "TRANSACTION" WITH DECEASED PERSON. — In Blount *v.* Blount, 48 So. Rep. 581, the Supreme Court of Alabama holds, under the statute of that State forbidding testimony by an interested party as to "any transaction" with a deceased person whose estate is interested in the litigation, that an alleged grantor in a deed to a deceased person, suing to have the deed canceled and expunged from the record on the ground that he never executed the deed, is competent to testify to the fact that he did not execute or acknowledge the deed, unless it conclusively appears that he was in fact a party to the deed, as otherwise he is not shown to be a party to any "transaction" with the deceased. The deed was, on its face, duly acknowledged by the grantor, but the officer before whom the acknowledgment was alleged to have been taken was dead.

VALIDITY OF STATUTE PROHIBITING ADVERTISEMENTS OF LIQUOR KEPT FOR SALE IN ANOTHER STATE. — In State *v.* J. P. Bass Pub. Co., 71 Atl. Rep. 894, the Supreme Judicial Court of Maine holds that the statute of that State providing that "whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given," shall be subject to fine, prohibits notices or advertisements of liquors for sale or kept for sale in

another State and as so construed does not infringe the commerce clause of the United States Constitution. It is held that advertising is in reality nothing more than soliciting, and may be prohibited by the State just as the soliciting of orders for liquor by an agent may be prohibited. The fact that newspapers and magazines published outside the State and containing liquor advertisements circulate freely in the State is held not to be a valid reason why the State may not prevent such advertisements in papers published in the State.

Admissibility of Bloodhound Evidence. — In Sprouse *v.* Commonwealth, 116 S. W. Rep. 344, the Kentucky Court of Appeals had occasion to pass upon the admissibility of evidence of trailing by bloodhounds. The dogs were shown to be of fairly good pedigree, but the evidence as to their previous training was not such as to prove them accurate and reliable in tracking human beings. No precautions were taken to prevent the dogs from getting on the scent of persons who had walked about the premises where the crime had been committed or upon the road taken by the dogs to reach the home of the defendant. They had no opportunity to obtain a scent of any article of wearing apparel or other personal effect belonging to the defendant to guide them, and they were not started at any place or object where it was known the person committing the crime had been. When the dogs finally started they were attended by an excited crowd whose presence seemed to confuse them. It was held that the evidence was inadmissible.

Liability of Sleeping Car Company to Porter Injured by Explosion of Bug Poison. — In Pullman Co. *v.* Caviness, 116 S. W. Rep. 410, the Texas Court of Civil Appeals holds that a sleeping car company is not liable for an injury to a car porter who is burned by an explosion of bedbug poison caused by a match left in one of the berths and accidentally ignited as the porter is cleaning the berth. It was alleged by the plaintiff that the defendant was negligent in failing to warn the plaintiff of the danger of using the bedbug poison, which was a highly inflammable substance, and in permitting the match to remain in the berth where it was liable to be ignited while the plaintiff was attending to his duties in taking care of the berth. It appeared that the company had used the particular bug poison for a number of years without accident, and that there was nothing in its composition to show that it was dangerous when properly used. The court took the view that the injury of the plaintiff could not reasonably have been anticipated by the defendant and that it was guilty of no negligence proximately causing such injury.

Charging Dyeing of Dog at Dog Show as Libel. — In Van Heusen *v.* Doe, 87 N. E. Rep. 437, the New York Court of Appeals holds that it is libelous to charge that a person competing for prizes at a dog show put dye on a competing dog so as to disqualify such dog, but that the complaint before the court does not sufficiently show that the article complained of was libelous. The article states that it is "a question for the N. E. K. C. to answer" as to who dyed the dog, and then states that the question can be answered by acertaining who had an interest in having the dog dyed and disqualified, and asks who it was that discovered on the last day of the show that the dog was dyed, and if the person who made the discovery had an opportunity to put dye on the dog; and concludes: "A crime was committed. The motive is plain. Who was it that had such a motive?" The court holds that the article is not libelous on its face and that it is necessary for the complaint to allege extrinsic facts and circumstances showing that it is libelous, and says: "I do not believe that putting dye on a dog necessarily involves any moral delinquency whatever. Some men and women dye their hair. It may exhibit bad taste, but the act subjects a party to neither moral condemnation, ridicule, nor contempt."

Difference between Jails as Unequal Punishment. — In Wichita *v.* Murphy, 99 Pac. Rep. 272, the Supreme Court of Kansas passed upon a rather novel question involved in an appeal from a sentence to imprisonment in a city jail, for violation of an ordinance against the sale of intoxicating liquors. The ordinance was enacted in pursuance of authority conferred by a general statute, and provided for imprisonment in the city jail. It was urged for the defendant that the ordinance was invalid as prescribing an unequal punishment because of the dissimilarity in the condition of city jails throughout the State. The court thus states the contention: "It is insisted that city jails are not uniform in quality throughout the State. Some may be reasonably comfortable, while others are so exposed to the weather or other uncomfortable and unhealthy conditions as to imperil the lives of those confined therein; that this wide difference in the character of city prisons would make the punishment very unequal if all offenders were to be committed to the city prison, and therefore any ordinance is void which so provides. The logic of this argument seems to go to the extent that incarceration in a clean, comfortable city jail would be less repressive upon offenders than in one which might be offensive and unhealthy, and would amount to a milder degree of punishment in one place than another." The court declares this contention unsound, and suggests to intending violators of the law the following precautionary measure: "If a joint keeper in any city thinks the jail there worse than in other cities, the law will permit him to move his business to wherever he can find a jail that is satisfactory."

Unlawful Interference with Business by Establishing Competing Business. — In Tuttle *v.* Buck, 119 N. W. Rep. 946, the Supreme Court of Minnesota holds that a good cause of action is stated by a complaint alleging in substance that the plaintiff was engaged in the trade of a barber in a certain village and that the defendant, a man of wealth and influence, in pursuance of the wicked and malicious purpose of injuring the trade of the plaintiff, fitted up and furnished a barber shop in the said village, employed a barber to conduct said shop, and used his personal influence to attract customers from the plaintiff's shop, all of which was done by the defendant with the sole design of injuring the plaintiff and not for the purpose of serving any legitimate interest of his own, and that by reason of the means aforesaid, employed by the defendant, the business of the plaintiff was materially injured and the income thereof reduced. Mr. Justice Elliott delivers the opinion of the court, but personally dissents therefrom. He says: "There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business."

News of the Profession.

Made Federal Attorney. — Robert T. Devlin was, on March 19, named by the President to be United States attorney for the northern district of California.

An Unusual Punishment. — By a vote of 78 to 25 the Texas house of representatives recently passed a bill providing emasculation as a punishment for the crime of rape.

WARRENTON GETS FEDERAL JUDGESHIP. — On March 18 President Taft sent to the senate the name of John W. Warrenton, of Cincinnati, to be United States circuit judge for the sixth circuit.

APPOINTED FEDERAL JUDGE FOR PENNSYLVANIA. — Charles Prentiss Orr, of Pittsburg, was, on March 25, nominated for the position of United States district judge for the western district of Pennsylvania.

NEW JUDGES FOR SOUTH DAKOTA COURT. — On March 30 Governor Vessey, of South Dakota, appointed Judge J. H. McCoy, of Aberdeen, and Judge E. G. Smith, of Yankton, to be associate justices of the South Dakota Supreme Court.

NEW BRUNSWICK JUDGE RESIGNS. — On March 30 Hon. George F. Gregory, of the Supreme Court of New Brunswick, tendered his resignation, to take effect at once. His action was necessitated by ill health.

PURDY RENOMINATED. — Milton D. Purdy, whose nomination by President Roosevelt to a federal judgeship in Minnesota was not confirmed by the senate, has been renominated for the position by President Taft.

GOVERNOR COSGROVE, OF WASHINGTON, DEAD. — Samuel G. Cosgrove, governor of Washington, and a lawyer of ability, died at Paso Robles, Cal., on March 28. He was one of the leading members of the convention that framed the constitution of Washington.

LAWLER MADE ASSISTANT ATTORNEY-GENERAL. — The nomination of Oscar Lawler, United States district attorney for the southern district of California, to be assistant attorney-general of the United States, was sent to the senate on April 1.

CHICAGO LAWYER DIES IN FLORIDA. — Daniel J. Schuyler, a well-known Chicago lawyer and senior member of the firm of Schuyler, Jamieson & Ettleson, died in St. Augustine, Fla., on April 1, of blood poisoning, aged seventy years.

MANITOBA JUDGE RESIGNS. — On March 31 Mr. Justice Phippen, of the Manitoba Court of Appeal, tendered his resignation to Minister of Justice Aylesworth. Mr. Justice Phippen has served in the court but a few years. He will resume private practice.

CHIEF JUSTICE OF PORTO RICO DEAD — HIS SUCCESSOR. — Chief Justice Severo Quinones, of Porto Rico, died on March 12 in San Juan. On March 25 President Taft nominated as his successor Jose Conrado Hernandez, and at the same time designated Emilio Toro y Cuevas to be an associate justice of the court.

TEXAS PIONEER DIES. — Judge T. M. Crooks, formerly United States judge of the northern district of the Indian Territory, died in Denison, Tex., on April 1, at the age of seventy-six years. Judge Crooks was a member of the first Texas legislature and was an intimate friend of General Sam Houston.

A NEW LEGAL MAGAZINE. — Through mere oversight we have hitherto failed to welcome to the fold of legal periodicals the *Docket*, which is published by the West Publishing Company. Being as yet a mere infant, it should not be judged by exacting standards, and we dare say it will improve with age.

GEORGIA LAWYER MURDERED. — Pope Hill, a lawyer of Macon, Ga., was shot in the head and killed on April 5 by an unknown person, in McRae, Ga., whither he had gone on business connected with the claim of the Norman W. Dodge estate, of New York, to lands in South Georgia. His is the third homicide that has sprung from the Dodge claim.

AN HONEST LAWYER! — The newspapers have been chronicling with apparent astonishment the fact that George C. Bodine, an admiralty lawyer, of New York city, who filed a petition in bankruptcy, with liabilities of $45,000 and no assets, has paid all his creditors in full out of a $100,000 legacy that recently came his way.

APPOINTED TO QUEBEC COURT OF KING'S BENCH. — On March 21 an order in council was passed appointing Judge St. Pierre, of the District Court of Beauharnois, to the King's Bench at Montreal, in place of the late Mr. Justice Mathieu. Mr. Wilfred Mercier, K. C., of Montreal, was at the same time appointed judge of the District Court at Beauharnois.

DEATH OF OLD MAINE LAWYER. — H. L. Whitcomb, formerly a criminal lawyer of note throughout the State of Maine, died in Farmington, on March 18, at the age of eighty-six. Many years ago he attracted considerable attention by arguing an important case before a Boston court while wearing rawhide boots, into which his trousers were tucked.

JEROME CHARGES DISMISSED. — On March 23 Governor Hughes dismissed the charges filed against District Attorney Jerome, of New York city, by William F. King and others, representing a committee of stockholders of the Metropolitan Street Railway Company. The governor's action was based on the report of Commissioner Richard L. Hand, who was appointed to take testimony on the charges.

DEATH OF NOTED VERMONTER. — Hon. Henry Clay Bates, for thirty years one of the leading lawyers of Vermont, and at one time lieutenant-governor of the State, died on March 12 in Berkeley, Cal., where he had resided since 1907. In 1901 he was appointed by President McKinley a judge of the Court of First Instance at Iloilo, in the Philippines, which position he held for five years. He was sixty-six years old.

BOWERS MADE SOLICITOR-GENERAL. — The post of solicitor-general under the Taft administration has been accepted by Lloyd W. Bowers, of Chicago. Mr. Bowers, who is fifty years old, has been general counsel of the Chicago and Northwestern railroad for the last seventeen years, and is regarded as a lawyer of great ability. He is a graduate of Yale and of the Columbia Law School.

JUDGE DALLAS RETIRES. — Hon. George M. Dallas, United States circuit judge for the third circuit, announced, on March 15, that he had tendered his resignation to President Taft. Judge Dallas is seventy years old and has served on the federal bench for seventeen years, having been appointed by President Harrison on March 17, 1892. His retirement is said to have been induced by advancing age.

BOSTON LAW WRITER DEAD. — Causten Browne, for years one of the best known of the lawyers of Boston, died there on April 8 in his eighty-first year. To the legal profession at large Mr. Browne was known chiefly through his book on the Statute of Frauds, which, since its original publication in 1857, has gone through many editions and is still the standard work on the subject. Mr. Browne retired from active practice in 1908.

SALARIES OF OREGON SUPREME COURT JUDGES. — Our attention has been called to the fact that from the language employed in a previous issue to state that the chief justice of the Oregon Supreme Court received an annual salary of $4,500, the inference might be drawn that the salary of the other members was but $2,000. In fact the associate justices are paid $4,000 a year. The bench of the Oregon court has recently been increased from three to five judges, the new members being Will R. King and Woodson T. Slater, who had previously served as commissioners.

STIMSON RESIGNS — SUCCEEDED BY H. A. WISE. — Henry L. Stimson, United States district attorney for the southern district of New York, has resigned his post and returned to private practice. On March 25 President Taft sent to the senate

the name of Henry A. Wise as Mr. Stimson's successor. Mr. Wise, who is but thirty-five years old, has been assistant district attorney for seven years and has handled many important cases, including the prosecution of Charles W. Morse and the New York Central rebate case. He is a son of John S. Wise and grandson of Henry A. Wise, former governor of Virginia.

Dates for Bar Association Meetings. — The fourth annual meeting of the Mississippi State Bar Association will be held at West Point on May 4 and 5. The Louisiana Bar Association will meet at Alexandria on May 28 and 29. The convention of the Illinois bar will be held at Peoria on June 24 and 25, and the Wisconsin lawyers will meet in Milwaukee at about the same time. The meeting of the Ohio association will be held at Put-in-Bay as usual, the dates being July 6–8. The meeting of the Marylanders will be held on July 7–9, at a place yet to be announced, and the Virginians will assemble at Hot Springs on August 10–12.

Ex-Judge Green, of New Jersey, Dies. — Hon. Elmer Ewing Green, formerly a judge of the New Jersey Court of Errors and Appeals, died at his home in Trenton on March 17, within twelve hours after Governor Fort had named his successor. Judge Green, who was fifty-nine years old, had an inherited tendency to the bench. His father, Caleb Smith Green, was a judge of the Court of Errors and Appeals from 1873 to 1885; his uncle, Henry W. Green, was chief justice of the State and afterwards chancellor, and his maternal grandfather, Charles Ewing, was chief justice of the Supreme Court from 1824 to 1832. Judge Green was appointed to the Court of Errors and Appeals in 1903 by Governor Murphy, and at the expiration of his five-year term he declined a reappointment.

English Notes.

The Oldest Solicitor Dead. — Mr. Thomas Ingram, of Wigston, near Leicester, the oldest solicitor in England, recently died at the age of ninety-nine.

The Newest Thing in Excuses. — A man summoned for jury duty recently asked Mr. Justice Darling to excuse him on the ground that he had to go home and nurse a sick hen.

Judge Bompas Dead. — Hon. Henry Mason Bompas, K. C., who recently retired from the County Court bench after a service of fifteen years, died on March 4, aged seventy-three years. He was a son of Mr. Sergeant Bompas, who is said to have served Dickens as a model for Sergeant Buzfuz.

Two K. C.'s Dead. — Sir Edward Boyle, Bart., K. C., prominent both as a practitioner and a text-writer, died at his residence in London on March 19, aged sixty years. He was called to the bar at the Inner Temple in 1881 and became a Queen's Counsel in 1898. Mr. Reader Harris, K. C., who practiced at the Parliamentary bar, died in London on March 30, at the age of sixty-one. He was called to the bar at Gray's Inn in 1883, was appointed a Q. C. in 1894, and was elected a bencher in 1895.

Liability of Co-respondent for Damages. — In England a co-respondent in a divorce case cannot escape the payment of damages decreed against him even by the commission of suicide. In the recent case of Brydges *v.* Brydges, noted in the *Law Journal* for March 27, 1909, at page 201, the Probate, Divorce, and Admiralty Division held that the executor of the co-respondent, who had made away with himself before a decree against him for damages and costs had been made absolute, was bound by the decree.

English Criminal Statistics for 1907. — There is not much to be learned, beyond the fact that England's population keeps up to a fairly even level of crime, from the recently published criminal statistics for 1907. There were a total of 61,381 persons tried for indictable offenses during the year, as against 59,079 for 1906, and an annual average of 60,065 for the preceding five years. On the other hand, the total number of convictions for both indictable and non-indictable offenses fell from 622,444 in 1906 to 607,402 in 1907. Crimes of violence show a continued tendency to decrease and the level is kept up by the increase in crimes involving fraud and cunning.

Damages for Breach of Promise. — During the course of a recent trial at the Leeds Assizes, Mr. Justice Coleridge delivered himself of some sage remarks regarding the measure of damages in actions by women for breach of promise of marriage. "If the lady is young in these cases," said his lordship, "and is attractive, then smaller damages should be awarded. An old and haggard person jilted would never have another chance, and the damages should be heavier." The action under consideration was brought by a woman of twenty-five, and it must be assumed that the jury considered her chances good, for they gave her only $350 damages.

A Testimonial to the Criminal Evidence Act. — At the close of a recent murder trial at the Staffordshire Assizes, which resulted in an acquittal, Mr. Justice Jelf paid a notable tribute to the Criminal Evidence Act. As one who had at first doubted extremely whether the scheme of allowing accused persons to testify was right in principle, he said emphatically that if this had been the only case he had ever tried, he should be thankful for the change, because without the opportunity thus presented it was unlikely that the prisoner, who was the only person present at the tragedy, could have escaped at least a verdict of manslaughter. Commenting on the incident the *Law Journal* says editorially that "all the fears which prompted the opposition to the act have, in truth, been falsified by the experience of its working. It is a fact that has its lesson for those who are timid about other changes in the law."

The Growth of Perjury. — The frequently remarked increase of perjury in the large cities of America appears to be paralleled in England. In a recent interview Judge Edge, of the County Court, is reported to have said: "False swearing in the witness box is rampant. It has always been bad, but I am inclined to think it is on the increase. Certainly it is far worse in London than in the country, for in the provincial towns the communities are smaller than in London; witnesses are well known and are in consequence more careful of what they say. Something should undoubtedly be done to stop this wholesale abuse." This condition is chargeable in large measure to the spread of education and the breaking down of old superstitions, particularly the fear of hell fire. Until education has proceeded far enough to build up a general appreciation of "right for right's sake," it is difficult to see where any efficient remedy is to come from unless the psychologists bring their lie-detecting machines to perfection.

"Turntable Doctrine" Sustained by House of Lords. — The growing tendency of the American courts to repudiate the so-called "turntable doctrine" announced by the United States Supreme Court in Sioux City, etc., R. Co. *v.* Stout, 17 Wall. 657, will be doubtless be checked to some extent by the recent decision of the House of Lords in Cooke *v.* Midland, etc., R. Co., noted in the *Law Times* for March 6, 1909, at page 403. In that case it appeared that the defendant company maintained a siding and a turntable on a piece of ground adjacent to a public road, which crossed their line by a bridge. This piece of ground was approached from the road by a gate, which was kept locked, and was separated from the road leading to the bridge by a hedge, in which there was a gap large enough for a child to get through, and there was a path, more or less defined, lead-

ing from this gap to the turntable. Some young boys obtained access through the gap to the turntable and while playing about it one of them was seriously injured. There was evidence that on a previous occasion an employee of the defendant had seen boys playing on the turntable and that they ran away at his approach. On these facts the House of Lords held that, although the defective condition of the hedge was not the effective cause of the accident, yet there was evidence of negligence on the part of the company sufficient to take the case to a jury. The court based its decision squarely on the same grounds taken by the United States Supreme Court in the Stout case.

AN ENGLISH VIEW OF PRESIDENT TAFT'S CABINET. — In a recent issue the *Law Journal* says editorially: "The cabinet of the new President of the United States bids fair to be known, like that of our own Prime Minister, as 'the cabinet of all the lawyers.' There are nine ministers in the American government, and of these five are active barristers — the Secretaries of State, of War, of the Interior, and of Commerce, and the Attorney-General — and a sixth, the Postmaster-General, has been called to the bar, though he has not practiced. It is not surprising that a President who has had experience of every branch of legal work, and who has essentially a great legal mind, should choose his colleagues from men of his own profession, though it suggests the reflection that he has taken all his men from the advocates' branch. The task which lies before the new President renders it peculiarly fitting that he should have the help of able lawyers. There are great questions of constitutional change and of legislation affecting trusts and corporations to the fore, which will require the most judicial and most subtle minds for their solution. President Taft has lately been giving his opinion of the lawyer; he has declared that the profession of law is virtually the profession of government, and that it is the creative, as distinguished from the analytic, function of the lawyer to express in written and legal form the exact intention of the person to which he wishes to give effect. Applying this conception to his cabinet, it may be said that it will be their function to give written and legal form to the will of the American people. Mr. Roosevelt has come to be known as the strenuous President; we can wish Mr. Taft no better fate than to be known as the legal President, and if he and his cabinet can carry through those law reforms which the people ask for they will indeed have deserved well of their country."

THE ROUPELL FORGERIES. — The death of William Roupell revives the memory of one of the most remarkable cases of forgery in the annals of crime. Roupell was the illegitimate son of a man of great wealth, but his father afterwards married William's mother, and in any other country but England the stigma of illegitimacy would have been wiped out. It had nothing, in fact, to do with his crime. That seems to have been brought about by the pressure of money difficulties. Already before his father's death he had familiarized himself with crime and successfully forged his father's name to several deeds of gift. Then came the great temptation. His father died suddenly, and Roupell, searching among the papers, found a will executed only a short time before death, giving everything to a younger brother, Richard. To destroy this will would have been too dangerous; the draft was probably in the possession of the father's solicitors. Instead of that, Roupell set about forging a new will revoking the real will, giving everything to the testator's wife, and appointing his son William executor. This was a master stroke, because it diverted suspicion from himself while giving him the real control of the property, his mother being entirely under his influence. The *coup* proved successful, and Roupell then proceeded to squander his ill-gotten fortune, and finally had to fly the country to avoid his creditors. Before he had left he had hinted to one of the purchasers of a part of the property, now known as the Norbiton Park estate, that his brother Richard was the true owner, and eventually Richard brought an action to establish his title. Then came the surprise. Roupell of his own accord left his sanctuary in Spain, urged, like Eugene Aram, by some haunting spirit of remorse, gave evidence in the action admitting his own guilt, was immediately arrested, and sentenced to penal servitude for life. After fourteen years, so exemplary was his conduct, he was released, and the rest of his life he spent — respectable and respected — in quiet retirement at Streatham. It is a strange story, full of interest not only to the student of human nature, but to the criminologist. Forgery, whatever its precise moral turpitude, is one of the worst crimes against society. It strikes at property and imperils all titles. It involves as sufferers innocent third parties; that is why our ancestors thought it necessary to hang for it even such a popular divine as Dr. Dodd. And what makes it worse is that no precautions are of any avail against the skilful forger; or, to put it more correctly, such precautions are impracticable. To scrutinize every signature as a possible forgery would paralyze business. No law or legislation, for instance, could have prevented the Roupell forgeries, unless, indeed — *quod Dii avertant* — every will was required to be executed before a Somerset House official and forthwith deposited there till the testator's death. But remedies like these are worse than the disease. — *Law Journal.*

Obiter Dicta.

SURE. — "A long account is an account of at least some length." Druse *v.* Horter, 57 Wis. 644.

REMARKABLE! — "At common law 'double or treble damages' were often allowed by statute." Hoban *v.* Ryan, 130 Cal. 98.

AVERAGING UP. — "The lawyers appear to be getting more jobs under the new administration than the rough riders." — *Springfield (Mass.) Republican.*

ASKING TOO MUCH OF TYPE. — In Acme Flexible Clasp Co. *v.* Cary Mfg. Co., 99 Fed. Rep. 500, the defendant moved for a rehearing on the ground that the court misunderstood the testimony of one of the witnesses, "because the inflections in his voice were not produced in print."

A ZEALOUS ADVOCATE. — In a personal injury case recently tried in Sioux City, Iowa, counsel for the plaintiff, after introducing a number of witnesses, made the following request of the court: "As there are some material points in this case as to which there are no witnesses, counsel asks leave of the court to testify."

PATRIOTISM. — The representatives of the people appear to have been unusually active of late in discharging their obligations to their constituents and laboring for the common welfare. One high-minded patriot has introduced a bill into the Minnesota legislature to prevent the desecration of the grand old flag by prohibiting chorus girls from wearing star-spangled tights.

A TACTFUL ORISON. — According to the Philadelphia *Record,* a young clergyman who was called upon to act as chaplain at the opening of a term of court in Maine, after covering everything he could think of as appropriate to say, from religion to law, closed his prayer with this supplication: "And, finally, may we all be gathered in that happy land where there are no courts, no lawyers, and no judges."

OF GREAT ANTIQUITY. — A valuable contribution to legal historical learning was recently made by Julius Harburger, president of the board of coroners of New York city. Addressing a meeting of the aldermen's committee appointed to hold hearings

on the proposed new city charter, Mr. Harburger stated that the office of coroner was established by King Alfred II. of England.

Sure to Land Him. — A correspondent sends us the following warrant, which was recently issued by a county J. P. in Alabama. The charge preferred against Mr. Mahew would seem to be sufficiently comprehensive to catch him if he was a law-breaker of any kind:

The State of Alabama — Madison County.

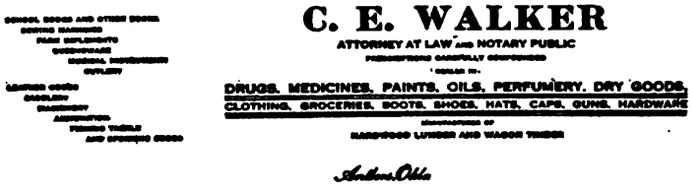
To Any Lawful Officer of the State of Alabama:

You are hereby commanded to arrest Henry C. Mahew and bring before J. P. Furgerson, J. P., on the 9th day of April, 1909, or take him into custody instantly, to answer the State of Alabama on a charge of insanity and caryin unlawful weapons and threatning the lives of Men and Women in the neighborhood and disturbeing the Peace whitch has become a neuisance. Preferred by Marshall Storey.

Witness my hand this 6th day of April, 1909.

J. A. Galloway, J. P.

Lawyers' Cards and Letter-heads. — It has been quite a while since any additions were made to our museum of lawyers' cards and letter-heads. Consequently the two following specimens sent in by a friend are unusually welcome. This letter-head discloses one of the most versatile lawyers we have ever heard of.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From the following card one would judge that one Oklahoma lawyer at least is not suffering from business depression:

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Attorney At Law

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Had a Sufficient Motive. — According to the *Boston Transcript* a line of jurymen appeared in a Missouri court and every man explained that it would mean disaster to him to serve at that term of court — all but a little fellow at the tail end of the line. This man was a hunter and he had lived in a cabin on the creek all his life.

"You have no excuse to offer?" asked the surprised judge.

"No, sir."

"Haven't got a sick mother-in-law needing your attention?"

"No, sir; I ain't married."

"What about your crop?"

"Don't raise anything."

"No fence to fix up?"

"Haven't got a fence on the place."

"You think you can spare the time to serve on a jury two weeks?"

"Sure."

The judge sat a while and meditated. Reaching over, he whispered to the clerk, who shook his head in perplexity. Then the judge's curiosity got the better of him.

"You're the only man who's got the time to serve your country as a juryman," he said. "Would you mind telling me how it happens?"

"Sure not," said the little man, promptly. "I heard you was going to try Jake Billings this term. He shot a dog o' mine oncet."

Too Violent. — That all possible presumptions are in favor of the ladies, in the law as well as elsewhere, goes without saying, but it seems that when the law is asked to presume that a lady is married merely because she is of marriageable age, the law finds itself unable to follow the induction. In Erskine *v.* Davis, 25 Ill. 256, the court said: "But much more than this, we are asked to presume that Harriet Gittings must have been a married woman at the time she executed the deed in her maiden name, because we may reasonably infer from the testimony that she had for a long time been of a marriageable age, and in a great majority of cases we know that women do get married. Perhaps it may be unfortunate that it is so, but as we understand it, the law cannot make maiden ladies *femmes covert* by mere presumption, and against their consent. We must have some tangible evidence that they have actually been married before they can claim the benefits or be subjected to the burthens of that relation, and especially before strangers shall take any advantage on the assumption that they are married."

An Old Timer. — In reversing the judgment in Carson *v.* Fears, 91 Ga. 482, and remanding the case for a new trial, Mr. Justice Lumpkin commenced his opinion as follows: "The chief justice asked the writer, one day, when we were considering whether or not certain acts of a corporation were valid, 'Did anybody imagine, when you were an infant in caps, that you would ever be called upon to pass judicially upon the law of *ultra vires*?' At that time such a thing might have seemed quite improbable, but it was hardly less so than that in the year of grace 1893 I would participate in deciding a case begun on the 26th day of July, 1860, when I was in my first term at school; and yet both these things have come to pass. I *have dealt*, judicially, with the law of *ultra vires*, and I am now attempting to write an opinion in a case which was actually in court when I was a little child. This case is certainly a venerable piece of litigation. It began nearly one-third of a century ago, has already lived the average time allotted to the life of man, has been upon the docket of the Superior Court during the terms of many judges, including one who afterwards served a term upon the Supreme bench of this State, and is now of counsel for the plaintiff in error, and surviving earthquakes, famines, wars, and political revolutions, it still lives and flourishes. Neither one of the two original parties to the action is now in life, and as it goes back to the court where it originated, for another trial, we are not at liberty to predict that another generation of litigants will not participate in it before it reaches a final determination."

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HOW JUSTICE MCKENNA GOT ON THE BENCH. — Mr. Justice McKenna, of the United States Supreme Court, served in the House of Representatives from California when Benjamin Harrison was President, says the *Saturday Evening Post*.

A federal judgeship vacancy occurred in the California district and there were several applicants, to one of whom Mr. McKenna was pledged. President Harrison didn't want to appoint any of them, and the matter hung fire. Finally, Justice McKenna was presented as a compromise candidate, but refused to enter until it was certain that the man he had indorsed had no chance at Harrison's hands.

Thomas H. Carter, then in the House and now senator from Montana, went over to see President Harrison about it.

Mr. Harrison gave no sign, but said he would not appoint McKenna, because he had not sufficient judicial experience, and had been too long away from the law.

Mr. Carter argued with the President, extolling Mr. McKenna's qualifications.

"Tell McKenna," said Harrison, "that I do not think I shall appoint him."

"Before you make that decisive, Mr. President," said Carter, "I wish you would do me a favor."

"What is it?"

"Read the speech McKenna made in the House after your neighbor, Bynum, had ripped you to pieces for your alleged Chinese record. He came to your rescue when all your colleagues from Indiana sat silent."

Mr. Harrison said nothing, and for two days sent in no nomination. Then, without a word to Carter or McKenna, he sent in McKenna's name for the vacant judgeship, which led to Mr. McKenna's seat on the Supreme Court bench.

Correspondence.

LAWYERS IN LINCOLN'S CABINET.

To the Editor of LAW NOTES.

SIR: In your issue of LAW NOTES for April, in speaking of Lincoln's first cabinet, you say it had "seven members, of whom five were lawyers," viz., William H. Seward, Salmon P. Chase, Gideon Welles, Edward Bates, and Montgomery Blair.

Why do you not name Caleb B. Smith among the lawyers of that cabinet? The people of Indiana of that day rated him as an able lawyer, and Mr. Lincoln appointed him district judge for the district of Indiana, which position he occupied at the time of his death.

You might have added that Simon Cameron, the seventh member of that cabinet, was early succeeded by Stanton, another very able lawyer.

ROBERT W. MCBRIDE.

INDIANAPOLIS, IND.

[Mr. L. T. Michener, of Washington, D. C., also calls attention to the above-stated facts in regard to Caleb B. Smith, and adds that Mr. Smith "was followed in the cabinet by John P. Usher, who afterwards became a leader of the bar in the State of Kansas." — ED. LAW NOTES.]

IN RE THE ART OF PLAGIARISM.

To the Editor of LAW NOTES.

SIR: I greatly enjoyed reading your editorial, "The Deadly Parallel and Hannis Taylor." By reference to a review of his English Constitution in the New York *Evening Post* (January 21, 1899), it would appear that his Science of Jurisprudence is not his first offense. In said review the following appears: "This is a second-rate book, written by a second-rate thinker." "Mr. Taylor's treatise, for example, is clearly not the result of original research." "But a mere glance at Mr. Taylor's notes also proves that his reading has not deviated from the ordinary channels." "The candor, not to say the simplicity, with which he cites his authorities, disarms criticism." "Original research is not the note of Mr. Taylor's work." "Unfortunately, Mr. Taylor seems incapable of turning to account an original idea." "Even his mistake is untainted by originality."

Another instance, though not so serious, of leaving out quotation marks is furnished by a reference to 162 Fed. Rep. 741,

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first paragraph, tenth line, where, in its charge to the grand jury, the court said: "The bare mention of which will *stir a fever in the blood of age and make the infant's sinews strong as steel.*" The part here underscored sounded quite familiar; and upon inquiry of my boys as to whether they could recall its source, they thought it was from Spartacus's address to the gladiators — it was not — but finally the spear of memory found it in "Catiline's Defiance." As I recall, the LAW NOTES for December, 1908, page 171, quoted an extract from this same charge to the grand jury.

JOHN T. COOK.

ALBANY, N. Y.

[A letter from Mr. Taylor, dealing with this controversy, received too late for publication in this number, will appear in June LAW NOTES. — ED. LAW NOTES.]

CONDITIONAL PARDONS.

To the Editor of LAW NOTES.

SIR: In the April number of LAW NOTES, under the title of "Validity of Conditional Pardons," you quote from Chief Justice Beatty of the Supreme Court of California as saying in *Ex parte* Kelly, 99 Pac. 399, when the question of a conditional pardon was considered: "This question, so far as I am advised, is entirely new. No authorities are cited, and I know of none;" and to show that the question has been considered before, you quote from the Encyclopædia of Law.

Having premised this much, I write to say that the entire question of a conditional pardon, its effect, and the procedure to be had in cases when the conditions of the pardon have been violated, are very fully considered in *Ex parte* Edward Alvarez, Vol. 50, Sup. Ct. Florida, page 24.

In that case, Alvarez, who had been convicted of murder in the second degree, was granted a pardon upon the condition that he lead a "sober, peaceful, and law-abiding life," and "failing in which the sheriff of any county is to arrest him and return him to the State prison to complete his sentence." Subsequently, the board of pardons directed his arrest by the sheriff of Bradford county, Florida, with directions to deliver him to the agent of the State to complete the remainder of his sentence. After his arrest Alvarez sued out a writ of habeas corpus, mainly upon the ground that the order made by the board of pardons, for his arrest, was made and passed without notice to him and without his having had an opportunity to be heard. To this petition the sheriff made return setting up the facts as above detailed. The petitioner moved to quash the return. The motion was denied and a writ of error sued out and the case reviewed by the Supreme Court of the State. In reviewing the case the appellate court held, among other things, that after a convict has been released on a conditional pardon, his rearrest and recommitment to his original sentence cannot be had upon the mere order of the governor or board of pardons, in the absence of a statute, or by express terms of the pardon, and that in the absence of a statute the convict is entitled to a hearing before some court of general criminal jurisdiction, in order that he may show that he has performed the condition of the pardon or that he has a legal excuse for not having done so, or that he is not the same person who was convicted; but that the criminal is not entitled to a jury trial except upon the question of whether he is the same person who was convicted, though in all questions involved it is a matter of discretion with the judge as to whether he will be allowed a jury trial. In conclusion the court states that "the established practice at the common law and in the American States, in the absence of statutory regulations and in the absence from the pardon itself of express stipulations for that purpose, is for some court of general criminal jurisdiction upon having its attention called, by affidavit or otherwise, to the fact that a pardoned convict has violated or failed to comply with the conditions of his pardon, to issue a rule reciting the original judgment of conviction and sentence, the pardon and its condition, and the alleged violation of, or noncompliance with, the condition thereof, and requiring the sheriff to arrest the convict and bring him before the court to show cause, if any he can, why the original sentence imposed upon him should not be executed," and that a copy of such rule should be served upon him at the time of his arrest. If upon investigation it be found that he has not violated the conditions of the pardon or that a valid reason or excuse exists for a noncompliance therewith, he should be discharged. If, upon the other hand, it be found that he has violated the condition of the pardon and has no valid excuse for not complying with the condition of same, he should be remanded to custody and ordered to have the original sentence imposed upon him, or so much thereof as has not been already suffered by him, duly executed.

JOHN E. HARTRIDGE.

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Law Notes

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Meaning of the Commodities Clause.

THE Supreme Court decision upon the so-called "commodities clause" in the Hepburn Act of 1906 will be disappointing to both sides in the controversy. The clause in question is as follows:

"From and after May 1, 1908, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it or under its authority or which it may own in whole or in part or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The only commodity produced to a large extent in which common carriers had a large interest was coal, especially anthracite, and it was "the anthracite roads" which contested the constitutionality of the act under the construction which the government sought to place upon it. The government contended that the act prohibited the interstate transportation of coal mined by roads which had a direct interest in the producing mine, and also of coal mined by companies in which the roads had a stock interest. The roads on the other hand sought to establish that the act as construed by the government was not a valid regulation of commerce, but was such an interference with their pre-existing property rights as amounted to confiscation and was violative of the due process clause in the Fifth Amendment.

The court interpreted the act as only prohibiting carriers from transporting commodities when at the time of transportation they have "an interest, direct or indirect, in a legal sense, in the commodity." So the act does not apply (1) where the railroad owns the mines and mines the coal, but in good faith sells it before the transportation begins; nor does it apply (2) "to commodities manufactured, mined, produced, owned, etc., by a corporation because a railroad company is a stockholder in such company." As thus construed, the commodities clause is held to be a valid regulation of commerce within the power of Congress to enact.

In the synopsis of the holding of the court prepared by Mr. Justice White, who also wrote the elaborate opinion, it is said:

"The contentions elaborately argued for the railroad companies, that the clause if applied to pre-existing rights will operate to take property of railroad companies and therefore violate the due process clause of the Fifth Amendment, were all based upon the assumption that the clause prohibited and restricted in accordance with the construction which the government gave that clause and for the purpose of enforcing which prohibitions these suits were brought.

"As the construction which the government placed upon the act and seeks to enforce is now held to be unsound, and as none of the contentions relied upon are applicable to the act as now construed, because under such construction the act merely enforces a regulation of commerce by which carriers are compelled to dissociate themselves from the products which they carry and does not prohibit where the carrier is not associated with the commodity carried, it follows that the contentions on the subject of the Fifth Amendment are without merit."

It is stated that six of the eight railroads interested in the suit conduct their mines through subsidiary companies in which they are stockholders. This method of doing business is legitimate under the second exception stated above. The Delaware and Hudson Railroad Company sells its coal at the mouth of the mines, and is therefore within the first exception. Only the Delaware, Lackawanna and Western conducts its mines in a method obnoxious to the act as interpreted. It will, of course, modify its methods by organizing a subsidiary company to work its mines.

This decision reverses the decision of the Circuit Court holding the commodities clause unconstitutional. See LAW NOTES for November, 1908, p. 141.

Courts of Arbitration and National Courts.

IN an interesting address before the American Society of International Law, Senator Root, the distinguished president of the society, discussed a question which must have occurred to him when, as secretary of state, he was dealing with some of our South American neighbors. The question is:

"When one nation urges claims in behalf of its citizens upon the government of another nation and proposes arbitration, how far does that other nation's respect for its own independent sovereignty and for the integrity of its own judicial system require it to insist that the claims be submitted for final decision to its own national courts?"

Senator Root finds the solution of the problem by considering the nature of the obligation which constrains a nation to submit questions to any tribunal whatsoever.

Since each member of the family of nations must be regarded as sovereign and as subject to coercion from no outside source, an adequate motive for any course of conduct can be found only in its own conception of duty. A postulate which lies at the basis of all modern diplomatic usage is that every sovereign is willing at all times and under all circumstances to do what is just.

"The obligation," says the senator, "which this willingness implies is no impeachment of sovereignty. It is voluntarily assumed as an incident to the exercise of sovereignty because it is essential to a continuance of the conditions under which the independence of sovereignty is possible. This obligation is by universal consent interpreted according to established and accepted rules as to what constitutes justice under certain known and frequently recurring conditions; and these accepted rules we call international law. No demand can ever be made by one nation upon another to give redress in any case but that the demand is met by an avowed readiness to do justice in that case, and upon that demand, in accordance with the rules of international law. No compulsion upon sovereignty is needed to reach that result."

Such being the general principle governing the submission of questions to arbitration, they may be submitted either before or after decision by national courts, and precedents for each procedure may be found in the diplomatic history of the United States.

The better rule is to submit such international questions to arbitral courts in the first instance. The contrary course involves a trial of the judicial system under which the denial is alleged to have occurred, as well as aspersions on government and on high officials. Yet it is an undisputed rule that the decision of a national court is not regarded as final in international law, and the reasoning which dictates submission before decision by national courts "would require that when such cases have been decided already by national courts, and the impartial justice of the decision is seriously questioned, upon substantial grounds, they should be resubmitted to an arbitral tribunal, not for proof that justice had been denied, but for rehearing upon the merits because self-respect and intelligent self-interest forbid a nation to shelter itself behind decisions of its own courts that rest under the imputation of partiality, or to be content with any but the best means and the most sincere effort to learn what is just in order that the nation may do what is just."

Law Reform in the Air.

THE idea of reform in our systems of legal procedure is in the air. On every side one comes upon addresses and articles calling attention to glaring defects in the inherited methods of our courts and in the attitude of judges and lawyers toward the cases presented for consideration. The President of the United States has spoken on the subject, and his mastery of law and his experience as a judge lend a weight to his views which even his pre-eminent position could not give. Bar associations everywhere are searching for plans of improvement, and at every professional gathering learned lawyers are pointing to instances of the failure of justice as it is administered, and bewailing the tendency toward technicality and formalism to which the failures pointed out are traced. The lay press has caught up the chorus and repeats with glowing indignation the half-understood illustrations of extreme technicality which in professional addresses have been gleaned from the thousands of volumes which contain the records of our century of legal history. The cases of verdicts set aside because the jury wrote "guilty" without the *l*, and of indictments held bad because the defendant's name was spelled with an *a* instead of an *o*, have become the stock illustrations of the editorial room, and in the light of the twentieth century we have indignant scorn for the profession, judges and advocates alike, of earlier generations.

Now all this agitation is addressed to a real evil and we trust will result in a much-needed reform. But it is exasperating to find the demands for this reform conveyed in articles which abound in misstatements, in ignorance of the most elementary facts and the most fundamental canons of historical development, and in misplaced and supercilious criticism of a noble profession and of its honored names. Nor do we think that lawyers in addressing bodies of lawyers have sufficiently guarded themselves against misconstruction by ignorance. Their addresses form the material from which the editorial writer draws for inspiration on this topic. Unless correct points of view are carefully emphasized, the most ordinary statements will come forth from the editorial sanctum with the scars upon them of a sea-change into something wild and strange.

Crude Arguments for Law Reform.

AN editorial in a St. Louis paper on law reform purports to be based on two articles in professional journals, one by President Lehman of the American Bar Association, the other by Dean Lawson of the University of Missouri. We have read only one of these articles, but we are perfectly sure that from neither of these distinguished gentlemen could have come the mass of ignorant and egregious misstatement contained in the following passage:

"Codes have become complicated from various causes, chiefly the ingenuity of lawyers in the evolvement of technicalities. The practice and declaration of the law have steadily tended towards formalism. The substance of the law, the effort for justice, has been lost sight of. The old common law has been to the world a legacy of confusion and complication. All the movement it would seem has been away from the one thing most desirable, an early, fair trial at the least possible delay and expense."

There runs through this quotation a brilliant *ex cathedra* ignorance not only of legal history, but of the conditions of progress in every department of human thought. Codes have become technical because they are administered, not by supermen, but by mere men who share with all their poor fellow creatures the inability to escape from the trammels of past custom, because it is easier in doing an act to-day to conform to the form of yesterday's action rather than to its spirit. So religion, after every reformation, every infusion of fresh spirituality, every restatement of creeds and doctrines in simpler terms, tends, if only a single religious movement is in the mind, toward formalism, and the living creed of one generation becomes a dead form of words to its successors. But if the totality of the ages rather than a single movement is studied, the steady though slow progress cannot but be perceived.

A generation ago a brilliant legal thinker investigated the early history of law and institutions, and the results of his studies have become a part of the common stock of educated men. No one of the truths established by Sir Henry

Maine is better known than the intense and rigid formalism of early law. It is amply illustrated by the history of English law from which our own is derived. The dream of a golden age when substance and not form, justice and not observance of technicalities, was uppermost in men's thoughts is as completely out of date as that of a golden age in the history of society. Yet that, if anything, is implied by the statement that "the practice and declaration [whatever that may mean] of the law have steadily tended toward formalism." In fact, ever since the conception of law as distinguished from religion took form in men's minds, the growth has been steadily though slowly away from formalism toward right and justice, away from the shadow and toward the substance. True men are able to theorize better than to put in practice the theories they construct, and advances in the theory of legal administration have continually had to encounter imperfect understanding and administration by men reared in the old system. But each step forward, imperfectly though it be construed, is a point gained for further progress. Our own codes of procedure, of "the reformed procedure" as we are fond of calling it, were too often construed in the narrower spirit of the common-law pleader, and the whole system is now encrusted with a mass of illiberal interpretation which will make it very hard to realize and to enforce its true spirit. The truth is, the reformed procedure came too early in our legal history. Our courts had not had time to realize from actual experience the defects of the common-law system. Yet in spite of drawbacks, much advance has been made and the efforts of courts and lawyers to conform to its essential spirit will make further progress continually easier.

But no statement which we have been considering is more palpably shallow and misleading than that "the common law has left to the world a legacy of confusion and complication." Since no legal system can come into being full-armed and perfect, as Minerva from the head of Jove, we, living in the twentieth century, must have some system of law behind us, and we may well be thankful that the system from which our own developed was the English common law. Of course it is not perfect. It is not, as Lord Coke contended, the perfection of reason. But it is a system which has grown naturally, constantly adapting or striving to adapt itself to the life of its own time and country. It has not suffered a general arrest by precipitate codification. Since it is continually changing, the common law of one age is totally different from that of another, and the spirit which each age brings to its own common law is a contemporary spirit and therefore a liberalizing one. Lastly the depositaries of its decisions contain the most perfect material for a code which has ever existed, and the necessity for codification must necessarily arise in the life of every legal system. To speak of the legacy of confusion from the common law is to imply that we might have had either no legal history, or one which offers fewer traces of formalism and technicality than the common law. The last supposition would deprive us of all the great distinguishing advantages of our law. If the law of to-day contains technicalities and traces of an antiquated formalism which we have outgrown, the fault is in ourselves and not in the common law. England has that, as we have, but she has developed out of it within a generation a system to which our reformers are continually pointing as an ideal for our imitation.

Supreme Court and the Income Tax.

THERE is much talk of another attempt to provide a national income tax as a method of raising revenue. When the question was last presented to the Supreme Court in 1895 it will be remembered that such a tax was held to be direct within the rule of the Constitution (art. I., § 9) that direct taxes must be apportionel according to population among the States. *Pollock* v. *Trust Co.*, 158 U. S. 601. The decision was reached by a bare majority of the court, and overturned what had been regarded as a settled point in constitutional construction. Of the judges then on the bench only four remain, and they were equally divided upon the question. Should the question arise again, therefore, its decision would be in the power of the five justices who have since been added to the bench, Justices Peckham, Day, McKenna, Holmes, and Moody. Such a contingency as would be presented to the court has never arisen in its history. Would the new members of the court feel at liberty to decide the question upon their own individual conviction of its merits, or would they feel bound by the decision of the Pollock case? The Legal Tender cases present the nearest analogy, but the enfeebled condition of Mr. Justice Greer enabled the dissenting judges at the first hearing to maintain that the question could not be regarded as finally settled.

Viewing the case in the light of a mere decision between man and man, the justices might feel bound by precedent. But the analogy fails utterly. If the opposition to the policy of a decision in an ordinary case is sufficiently strong, the legislature may by enactment override it, but here there is no such remedy possible. The decision, moreover, involves a momentous public question, and the effect of the Pollock case was to deny to the national government a source of revenue utilized by every civilized government. Its utilization by our own government may become imperative in view of the agitation for a reduction of the tariff. Under such circumstances should the opinion of a single judge, fifteen years ago, prevent a vote upon the merits of the case?

In considering the question of a new income tax, the *Springfield Republican* forcibly observes:

"The country has never been satisfied with that decision of the court in 1895. It believes that the majority judges were moved to reverse that great tribunal on this question by the unreasonable outcries of a wealthy and influential class over what was feared or charged to be a great popular movement for the spoliation of that class. Public opinion has grown stronger ever since that the costs of the national government should not continue to be loaded altogether on the consumption of the masses, but should in part be borne by superfluous wealth. The graduated income tax alone affords a certain means of so placing a part of the burden, and no disrespect of the court is shown, and no derogation of its dignity is involved, in bringing the court to a reconsideration of this matter. The country has a right to know where it stands as now constituted, to the end that, if it is still of the 1895 opinion, the more difficult task of amending the Constitution may be undertaken in the assurance that this offers the only way of bringing about a greatly needed measure of federal tax and revenue reform."

IT is the duty of the court to repress sharp practice. Bacon, V. C., *In re Swire; Mellor v. Swire*, (1882) L. R. 21 C. D. 649.

Alien's Right of Action for Wrongful Death.

THE first statute in an English-speaking country which gave an action for the wrongful death of a man was Lord Campbell's Act, passed by the English Parliament in 1846. Statutes of a similar type were rapidly adopted in the various States of the United States. The world was ready for this legislation. The invention of the steam engine and its application in manufacturing and as a means of locomotion was revolutionizing the industrial structure of society. But the Genius of Industrialism demanded his victims, and many a life was crushed out by the vast machinery through whose means men harnessed the forces of nature. The practical injustice resulting from applying the maxim *actio personalis moritur cum persona* to cases of accidental killing was glaring, and this remedial legislation spread from State to State with surprising rapidity. In its development, however, false steps were inevitable here and there.

When the question arose whether the death of an alien by wrongful act gave a cause of action to the dead man's nonresident alien family or representatives, some courts conceived that to allow the right of action would impinge on the elementary rule that law is strictly territorial in its effects. It is held, therefore, as a rule of construction that, unless a different intent is manifest, a statute is to be held as applicable only in favor of persons within the State, and the conclusion is deduced that to give a nonresident alien a right of action under the wrongful death statutes is "obviously opposed to the spirit and policy of the statute." *Deni* v. *Pennsylvania R. Co.*, 181 Pa. St. 525. That this is a misapplication of the principle of territoriality seems on reflection to be perfectly plain. An alien as such is not denied the right to enforce in our courts rights which have vested in him. If this is true of rights arising at common law, it would seem equally true of rights given by statute. The territoriality of the law is as much affected by allowing the right in one case as in the other. It is to give effect to a harsh and narrow presumption, artificially raised without facts, to hold that a statute correcting a general evil in general words was intended to apply only to residents and not to nonresidents. The later and better considered cases, therefore, hold that a nonresident alien equally with a citizen may sue for death by wrongful act. *Davidson* v. *Hill*, (1901) 2 K. B. 606; *Romano* v. *Capital City Brick, etc., Co.*, 125 Iowa 591, 2 Ann. Cas. 678; *Mulhall* v. *Fallon*, 176 Mass. 266; *Low Moor Iron Co.* v. *La Bianca*, 106 Va. 83, 9 Ann. Cas. 1177. In the last-mentioned case decisions to the same effect are cited from Arizona, Delaware, Illinois, Indiana, Kentucky, Minnesota, and New York.

Right of an Alien as Affected by Treaty.

ANOTHER phase of the rights of aliens under these statutes has just been presented to the consideration of the Supreme Court of the United States. The treaty between the United States and Italy guarantees to the citizens of each of the high contracting parties in the territories of the other "the most constant protection and security for their persons and property," and that they "shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." In Pennsylvania, as we have seen, the courts hold that nonresident aliens cannot sue under the statute giving an action for wrongful death. It was held that there was no violation of this clause of the treaty in applying the Pennsylvania ruling to a case in which the plaintiff was a nonresident subject of the Kingdom of Italy, and this decision has been affirmed by the federal Supreme Court. *Maiorano* v. *Baltimore, etc., R. Co.*, 29 S. C. 424.

"It cannot be contended," says the Supreme Court, "that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory." She herself, therefore, is entirely outside the scope of the article. The argument, however, is that if the right of action for her husband's death is denied to her, that he, the husband, has not enjoyed the equality of protection and security for his person which this article of the treaty assures to him. It is said that if compensation for his death is withheld from his surviving relatives, a motive for carrying him safely is removed, the chance of his death from unlawful violence or negligence is increased, and thereby the protection and security of his person are materially diminished." The motive for such legislation may conceivably be twofold; the securing of greater protection for life, and the desire to secure compensation to those who may be supposed to suffer directly and materially by the death. "The last thought seems to have been uppermost in Pennsylvania according to the courts of that State." But assuming that protection may have been a motive in the legislative mind, "we are of opinion that the protection and security thus afforded are so indirect and remote that the contracting parties cannot fairly be thought to have had them in contemplation." And the treaty is fully complied with "if an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws of our own people, including all rights of actions for himself or his [resident?] personal representatives to safeguard the protection and security."

It is satisfactory to reflect that, with most of our States granting to nonresident aliens a right of action for wrongful death, the cases will be comparatively few in which the facts of the Maiorano case will be duplicated and yet the wrongdoer escape liability and the family of the deceased suffer.

In a somewhat parallel case the Supreme Court had decided that a State may grant to a widow a right of action for the death, occurring in another State, of her husband, if he is a citizen, while denying the right in case of the death of citizens of sister States, and that a statute so providing is not a violation of the constitutional provision that "the citizens of each State shall be entitled to the privileges and immunities of the citizens of the several States." *Chambers* v. *Baltimore, etc., R. Co.*, 207 U. S. 142.

Situs of Personal Property.

IN determining the *situs* of personal property courts are confronted with many embarrassing problems. In early times when all property inhered in some tangible thing and it was unnecessary to distinguish between the abstract idea of property and the concrete object of property, these problems could not arise. But those days are centuries behind us. It has been necessary to distinguish between the thing and the owner's rights in relation thereto, which are property in its strict sense. *Wynehamer* v. *People*, 13 N. Y. 378; Holland Jurisprudence (10th ed.)

202. A new difficulty was presented when, with the growth of contracts and analogous ideas, the notion of property was extended to intangible things. Where is the thing in which the property inheres? Is the *situs* of that intangible thing, a chose in action, such as a debt, where the creditor resides or where the contract which evidences the debt is found? The fiction, invented to solve all such cases, *mobilia sequuntur personam,* breaks down even as applied to tangible things, which, when justice requires it, may be regarded as separate from the person of their owner and as having a *situs* where they actually exist. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18. Intangible things, again, as stock in a corporation, may be regarded as having a *situs* not where the owner of the shares resides but where the corporation has its domicil. *State Railroad Tax Cases,* 92 U. S. 607.

Certain early formal contracts have for ages been regarded as absolutely identified with the material upon which the contract is written, which thus becomes the object owned, just as land or a chattel in similar circumstances. Bonds and other specialty debts are the typical representatives of this class and have their *situs* where the specialty itself is, thus becoming chattels in an exact sense. How far the same principle extends to negotiable instruments, which, in their origin archaic, are by a course of untrammeled common-law development so admirably adapted to contemporary needs, is a matter of grave dispute. In early times when the nearest analogous formal contract was the bond, it was natural that courts attempt to apply the principles governing bonds to negotiable instruments, and authorities of great learning regard the precedents as settling that bills and notes are chattels. 2 Ames Cas., Bills and Notes 799. But the later tendency is to assimilate them to other simple contracts, and it has been declared that "the rule giving jurisdiction where the specialty may be found has no application to a promissory note." *Buck* v. *Beach,* 206 U. S. 392 (403), 11 Ann. Cas. 732. The case just cited contains a full consideration of the *situs* of negotiable instruments for purposes of taxation in the opinion of the court and the dissenting opinion of Mr. Justice Day.

Taxation of Foreign Warehouse Receipts.

A CURIOUS instance of an attempt to extend the archaic identification of the written contract with the thing which it represents is found in the recent case of *Sellinger* v. *Kentucky,* 29 S. C. 449. The State of Kentucky levied a tax on the owner of certain German warehouse receipts for whiskey warehoused in Germany. The State alleged that the owner of the whiskey shipped it to Germany to avoid the payment of taxes upon it, that he held the receipts in Kentucky, where he used them as collaterals and traded in them, and it seems to have considered the facts as giving the State a right to tax the whiskey itself, identifying its *situs* with that of the receipts. The Supreme Court held that the tax was invalid. Even admitting that a promissory note held in Kentucky and due in Germany was taxable in Kentucky, the status of a warehouse receipt is entirely different. It is not in a proper sense negotiable in our law, and the German law as to such instruments was not shown.

"On the facts before us," said the court, "and on any facts that the Court of Appeals can have had before it, the receipts cannot be taken to have been more than one of several keys to the goods. It cannot be assumed that a good title to the whiskey could not have been given while the receipts were outstanding. We assume that they made it very unlikely that it would be, but the practical probability does not make the instrument the legal equivalent of the goods. We take it to be almost undisputed that, if the warehouses were in Kentucky, the State would not and could not tax both the whiskey and the receipts, even when issued in Kentucky form, and that it would recognize that the only taxable object was the whiskey. The relation of the paper to the goods is not changed by their being abroad, and the only question in the case is whether the paper can be treated as property equivalent in value to the goods, because in some ways it represents them" — a question answered in the negative.

The German law on the subject of warehouse receipts appears to be practically the same as our own. According to the German Commercial Code, arts. 363, 424, a warehouse receipt when made payable to order is transferable by indorsement, and its transfer has the same effect as the delivery of the goods represented. This is our law. *Shaw* v. *Railroad,* 101 U. S. 557.

A Mediaeval "Writing Obligatory."

THE latest volume of the publications of the Selden Society (Select Cases in the Law Merchant, 1270–1638) contains some interesting evidence for the antiquity in England of promissory notes, or perhaps we should say of the "writing obligatory," *scriptum obligatorium,* from which the modern note was developed. The book consists mainly of the records of the Fair Court of St. Ives in the later thirteenth and early fourteenth centuries, which by a fortunate chance have come down to us in an almost perfect state.

The form of these letters seems by several cases to have been quite constant. In *Hoppman* v. *Richard de Welborne,* Sel. Cas. Law Merch. 86, a case from the year 1302, such an instrument is set out in full. Its form is as follows: "To all who this present writing shall see or hear, Richard of Welborne, citizen and draper of Norwich, greeting in the Lord. Know that I am bound to Richard Hoppman, merchant of Lynn, in the sum of £33 sterling for cloth bought and received at the time of the making of these presents; wherefore I am well content to pay to the same Richard Hoppman, or to his attorney bearing the present writing, at the times and places underwritten, namely, at the fair of St. Ives at the feast of the Ascension of our Lord in the thirtieth year of the reign of King Edward [May 31, 1302] £20 sterling, and in the town of Lynn at the feast of the Holy Trinity [June 17, 1302] then next following £13 sterling, well and without delay. To which payment faithfully to be made I bind myself and my heirs and executors; and all my goods, wheresoever they may be found, may be distrained and detained by any sheriffs or bailiffs in whose jurisdiction (*potestate*) and districts my goods may be found, for full payment of the said money and for complete restitution of all damages and expenses which the said Richard Hoppman or his attorney shall have suffered (*fecerit*) or incurred by reason of default in the payment of the said money in the manner aforesaid. In testimony whereof I have affixed my seal to the present writing. Given at the

fair of Stamford on the sixteenth day of April in the aforesaid year." Suit was brought after default in the first instalment, on June 1, 1302.

An interesting point was raised in an action on a similar instrument by *John of Abington* v. *William Martin,* Sel. Cas. 65, decided in 1293. Here Martin by letter (*litteram*) obligatory promised to pay John "or his certain mandatory (*nuncio*) bearing the letter obligatory," etc. The action was in the name of John by William, his mandatory, and Martin objected that William produced no proof of his authority "save a certain letter obligatory and it is not known how he came by that letter." As to whether he was bound to answer William he put himself on the award of the merchants. Unhappily the trial of the case was postponed, and when it next came up (Sel. Cas. 66), Martin abandoned his former defense and pleaded payment, producing an acquittance from John, upon which Martin had judgment, although William denied that the acquittance was John's, upon the ground that it was "not lawful for one man to deny or abate the deed of another."

Martin must have felt uncertain about his first defense, but it would have been most interesting to have had an award of merchants on the point, and apparently it would have been in his favor. Four hundred years later, it was decided that the bearer of a note payable to J. S. or bearer could not enforce payment by an action in his own name, for a custom to pay to bearer was too general, *Horton* v. *Caggs,* (1689) 3 Lev. 299; and yet the maker is discharged by a payment to bearer, "though he comes to it by trover [finding], theft, or otherwise," *Hodges* v. *Steward,* (1691) 1 Salk. 125; that is, the maker would be estopped to deny the authority of the bearer of such an instrument to receive payment; but such a notion could hardly have existed in 1293.

CRIMINAL APPEALS IN ENGLAND.

FROM time to time the attention of the American lawyer has been attracted by disquieting attacks upon criminal procedure in this country, accompanied by suggestions of measures of reform. Many of these criticisms are clearly just. Some of the suggested remedies are so reasonable as to command ready concurrence, but others are so radical as to challenge instant opposition.

The most radical of these suggestions is the proposition to abolish the right of appeal in criminal cases, and to leave to the pardoning power the correction of judicial wrong. Startling as this proposal may seem, it has had the support of some of the most eminent lawyers of the land. In the course of an address before the New York State Bar Association in 1892 on "Respect for the Law," the Hon. Melville Bigelow said: "All right-minded lawyers would be glad to find some feasible way of shortening the long course of criminal trials. They seem to do these things better nowadays in England than we do; appeals cannot be carried so far, and the law is probably a greater terror to evil doers than it is here." Even more pronounced was the view expressed by Mr. Justice Brewer, of the United States Supreme Court, who, in an address before the American Bar Association in 1895, said: "In criminal causes there should be no appeal. I say it with reluctance, but the truth is that you may trust a jury to do justice to the accused with more safety than you can an appellate court to secure protection to the public by the speedy punishment of the criminal. To guard against any possible wrong to an accused, a board of review and pardons might be created, with power to set aside a conviction or reduce the punishment, if on the full record it appears, not that a technical error has been committed, but that the defendant is not guilty, or has been excessively punished." As recently as 1905, President Taft, then secretary of war, in an address to the graduating class of the Yale Law School, said: "If laws could be passed, either abolishing the right of criminal appeal and leaving to the pardoning power, as in England, the correction of judicial wrong; or, instead of that, if appeals must be allowed, then if a provision of law could be enacted by which no judgment of the court below should be reversed except for an error which the court, after reading the entire evidence, can affirmatively say would have led to a different verdict, ninety-nine reversals out of one hundred under the present system would be avoided."

When these views have been expressed, it has been the rule to point to the example set by England with respect to the right of appeal in criminal cases as worthy of emulation. But what has been the experience of England? is a question which is pregnant with meaning when the proposal to abolish, or materially to limit, the right of criminal appeal in the United States is under consideration.

In England, until recently, there was no right of appeal, properly speaking, in criminal cases. It is true that after a conviction for an indictable offense certain errors of law could be corrected by writ of error, and most rulings of law could be reviewed by the Court of Crown Cases Reserved. But a writ of error could not be obtained without the fiat of the attorney-general, and the trial judge could not be compelled to state a case for review of his rulings. Natually, it was extremely difficult to obtain a review of questions of law. With respect to questions of fact the position of the accused was utterly hopeless; a defendant had no appeal whatever from the verdict of a jury, though the evidence were ever so insufficient to support a conviction. The only remedy was to petition the Home Office for a pardon. And the criminal department of the Home Office was in no sense a reviewing tribunal; practically it never interfered with the verdict of a jury without new evidence. The function of the home secretary was not to administer justice but to dispense mercy. If a petitioner succeeded in convincing the Home Office that he was innocent of the felony for which he had been convicted, the home secretary, curiously enough, granted him a "free pardon." Sometimes, in addition to granting a free pardon to the petitioner for an offense which he had not committed, the home secretary would also grant him a sum of money to compensate him for the wrong which had been done him.

This system, upon which some of our most distinguished jurists have cast eyes of approval, has not been viewed with complacency by all Englishmen. It has long been felt by not a few that terrible wrongs were sometimes inflicted through defective workings of the machinery of justice; and that most of these wrongs could be avoided by improving the machinery. During the larger part of a century an agitation has been carried on persistently, and in spite of most discouraging rebuffs, to secure to a convicted defendant a right of appeal. As early as 1843 a bill dealing

with the matter was introduced in Parliament. Since then bill has followed bill to the number of thirty-three, or about that number. The giving of a right of appeal in criminal cases, not merely on questions of law, but on questions of fact, was carefully considered and proposed by the Criminal Code Commissions of 1878–1879 and embodied in the draft criminal code prepared by Sir Fitzjames Stephen and introduced into the House of Commons by Sir John (Lord Justice) Holker in 1878. The establishment of a Criminal Appeal Court has at various intervals during the last twenty-five years been pressed, sometimes by the introduction of bills, sometimes by speeches in debate on the second readings of these bills, sometimes in discussions on resolutions by men of such eminence in the legal world and public life as Sir William Harcourt, Lord James of Hereford, Lord Russell of Killowen, and Sir Robert Reid.

But all these efforts have encountered a stolid and, until recently, a successful resistance.

One of the chief arguments of the opposition was that allowing an appeal on questions of fact would substitute the judgment of a few lawyers, with only the record before them, for the judgment of twelve men who, having the witnesses before them face to face and hearing the testimony delivered orally, are better able to pass upon the testimony. This argument, of course, assumes that the reviewing judges would attempt to put themselves in the place of the jury, and pass upon the evidence *de novo,* instead of accepting the verdict of the jury unless it is against the clear weight of evidence, or it appears that the jury was actuated by corrupt, arbitrary, or other improper motives.

But the chief argument employed by the opponents of the proposed change was that the knowledge by jurors that their verdict is not necessarily final would greatly tend to diminish their sense of responsibility. While it seems incredible that any man trying a prisoner for a criminal offense would cease to do his duty because of the knowledge that he has a court of appeals behind him, this contention has done yeoman service; it has found a place in nearly every utterance in opposition to the proposed right of appeal.

These are no doubt sincere arguments advanced in all seriousness. But it is not easy to take them seriously. One instinctively feels that there must be some deep-rooted feeling or prejudice, none the less powerful and pervasive because inarticulate, and not even consciously entertained, behind an attitude which leads to the denial of appeals in criminal cases while appeals are freely allowed in civil cases involving only trifling amounts. Class antipathy is perhaps the explanation — the repugnance which the enlightened and law-abiding classes naturally have to the ignorant and less orderly classes from whose ranks the criminal element chiefly comes. So far back as 1844, Mr. Fitzroy (Lord Chief Baron) Kelly hinted that there would have been a Court of Criminal Appeal long since if members of the educated classes by whom the laws were made had been likely in very large numbers to be placed on trial in criminal courts; while the late Mr. Butt, Q. C., intimated a similar opinion in language more direct in moving on May 15, 1881, the second reading of a new trial (criminal cases) bill in the House of Commons. The fact was, he said, that a man's property was much more carefully guarded than his life and liberty, and he could only account for that by the fact that the members of the legislature were not so liable to be called on to answer for matters which would involve a restriction of their liberty as they were to answer a claim made on their estates. If they were, depend upon it they would have had a Court of Criminal Appeal long ago.

It was sometimes contended that a Court of Criminal Appeal was not needed. It was said that the machinery which existed in the Home Office for the correction of judicial wrong in criminal cases, though not perfect, was adequate for the purpose, and that the proposed appeal to a judicial tribunal would be more costly, more cumbrous, and more dilatory, as well as less practically effective. In a speech delivered before the House of Lords, in opposition to a criminal appeal bill, Lord Alverstone proudly boasted: "The certainty, the expedition, and above all the justice of our criminal procedure, has been the admiration of jurists of all civilized nations."

Had all this been as true as was fondly believed, there would have been no reason for making a change. But it was well known that criminal trials sometimes resulted in unjust convictions. The number of pardons granted by the Home Office showed this to be true. And there were those who did not believe that the Home Office righted more than a small proportion of the judicial wrongs which were committed, who did not believe that the small number of miscarriages of justice detected and remedied by the Home Office could be relied upon as proving that the total number of miscarriages was small. There were good reasons for this belief. The Home Office was not, and did not profess to be, a revising tribunal. It practically never interfered with the verdict of a jury without new evidence. At all events it never did so, unless the judge strongly dissented from the verdict. Then, too, the Home Office was essentially a secret tribunal. It carefully refrained from giving reasons for its decisions, and it constantly maintained an attitude towards petitioners calculated to discourage the bringing of appeals. Obviously no great confidence could be reposed either in the power or in the disposition of such a tribunal to remedy wrongful convictions.

That this want of confidence in the infallibility of the criminal courts and in the adequacy of the machinery of the Home Office to guard against wrongful convictions was well founded, was brought home to the British public in 1904 in a startling manner by the Beck case. This was one of the most terrible miscarriages of justice in the history of the law. The facts of the case, which are undisputed, may be stated briefly as follows: In 1877 a man who called himself "Lord Willoughby," representing himself to be a peer and needing a housekeeper for a house in St. John's Wood, managed to get wrongful possession of the jewelry of a number of women. His scheme was to write out a list of things which they were to buy, give them checks on a bank where he had no account, and then borrow their rings for the ostensible purpose of getting them better ones of the same measurement. He was arrested for obtaining money under false pretenses and for offering bogus checks, tried under the name of John Smith, and sentenced to a term of penal servitude. He served his term and was released. In 1896 a series of crimes of exactly the same nature were perpetrated by a man who called himself "Earl of Wilton," and once "Lord Wilton de Willoughby." An unfortunate Swede named Adolf Beck was

arrested. Before the examining magistrate the police officer in charge of the 1877 case positively identified him with John Smith, and a treasury expert testified that the documents were in the same handwriting as those in 1877. On the trial of Beck at Old Bailey it was ruled that evidence on the part of the defendant as to the identity of Beck with Smith was not admissible, although the identity of Beck with the Smith of 1877 was apparently made part of the case against him. On this point Beck had evidence to prove a complete *alibi* in 1877, and for Smith's entire term in prison. Beck was sentenced to seven years penal servitude, and, although he had not been identified with Smith at the trial, his clothes were marked to show a former conviction. Beck objected to this, and after several petitions the Home Office finally ordered the removal of the signs of a former conviction, but declined in any way to enter upon the accuracy or otherwise of the conviction. So poor Beck had to stay in prison until the expiration of his term. After coming out of prison he settled down to a quiet and industrious life, when it was suddenly reported to the police that the crimes of 1877 and 1896 were being repeated with all their peculiarities of method and names. Beck was again arrested, tried, and convicted. Mr. Justice Grantham, before whom he was tried, respited sentence until the following session, and during that period the John Smith of 1877 was arrested. The facts of the case being presented to the Home Office so forcibly, the home secretary beneficially granted Beck a "free pardon." Moreover the treasury offered him £2,000 as a *solatium*. Beck refused to accept that amount, and the offer was increased to £5,000.

No better demonstration of the inadequacy of the machinery of the Home Office to correct even the grossest errors in the trial of criminal cases could be needed. The Home Office, had it been a reviewing tribunal, could easily have prevented the carrying out of the sentence of Beck on his first conviction, and would probably have thereby prevented the second arrest and trial. And there can be no doubt that the existence of a judicial tribunal with power to review criminal trials on questions of law and fact, or even on questions of law alone, would have prevented the miscarriage of justice which occurred in this case. This was admitted even by opponents of the right of criminal appeal, as, for example, by Lord Alverstone, in a speech delivered in the House of Lords.

The Beck case gave a new impetus to the movement for the establishment of a Court of Criminal Appeal. It had the effect of arousing the general public to a realization that something was wrong with the English law of criminal procedure. It brought new recruits to the ranks of those who were fighting for the right of criminal appeals, not only from among those of the general public who had before taken little or no interest in the matter, but also from those who stood high in the legal and political world. To mention just one instance, at a public meeting held in 1905, Lord Russell said that until the revelations in the Beck case he did not believe in the establishment of a Court of Criminal Appeal, believing that the Home Office exercised care and made every possible effort to remedy injustice. But he was then satisfied that no person who had been wrongly convicted could hope to have his case properly inquired into, or any fresh evidence properly weighed, except by a properly constituted legal and judicial tribunal.

As if the Beck case were not enough, hard on its heels came the Edalji case. The story of the trial and conviction of Mr. Edalji, and his ultimate release by the Home Office, without a pardon, as told by Sir Arthur Conan Doyle, has been retailed in this magazine (10 LAW NOTES 230), and the reader is referred to that account of the case for the facts. It cannot be said that the miscarriage of justice was as clearly established in this case as in the Beck case. But the case clearly established the inadequacy of the Home Office as a substitute for a court of review. Mr. Edalji, after serving three years of his sentence, which was for a term of seven years, was released by order of the home secretary, but without receiving a free pardon or reparation. He was of course either guilty or innocent. If guilty he should have served his full term. If innocent he should at least have had a free pardon. But evidently the home secretary was unable to arrive at a conclusion one way or the other, although he received generous assistance from the newspapers, in which, it would seem to a distant observer, the question of the justice of the conviction was largely tried. The point is this: An adequate right of appeal would certainly have enabled a properly constituted court of review to come to some definite conclusion on the question of guilt or innocence.

The Beck case, which has sometimes been likened to the Dreyfus case, and the Edalji case, with its cumulative effect, gave new life to the already strong movement in favor of a right of appeal in criminal cases. Finally, after nearly a century-long struggle, the much-vaunted system of criminal procedure which knew no right of appeal by defendants convicted of felonies, and which has excited the admiration of distinguished American jurists, was humbled. On the 28th day of August, 1907, an act establishing a Court of Criminal Appeal, and giving a right of appeal in criminal cases, was passed.

By this act (7 Edw. VII., c. 23), which is entitled "An Act to establish a Court of Criminal Appeal and to amend the law relating to appeals in criminal cases," there may be an appeal on any ground which involves a question of law alone, which involves a question of fact alone, or a question of mixed law and fact, or any ground which appears to the court to be a sufficient ground of appeal. There may also be an appeal against the sentence, unless the sentence is one fixed by law.

An appeal on a question of law is a matter of right, but an appeal on a question of fact or of mixed law and fact can only be had with the consent of the Court of Criminal Appeal, or upon the certificate of the trial judge that the case is a fit case for an appeal. An appeal from the sentence must be with the leave of the Court of Criminal Appeal.

The personnel of the court is made up of the Lord Chief Justice and eight judges of the King's Bench Division. It is duly constituted if it consists of not less than three judges and of an uneven number of judges. If the Lord Chief Justice so directs, the court may sit in two or more divisions. All questions are to be decided by a majority, subject, in cases where a point of law of exceptional public importance is involved, to a possible further appeal to the House of Lords. One judgment (*i. e.*, opinion) only is to be delivered, unless on questions of law the court allows separate judgments. The court is a superior court of record, with full power to determine any question necessary to be determined for the purpose of doing justice

in the case before the court. It may call for the production of documents and exhibits, and order the attendance and take the testimony of witnesses.

Some idea as to the practical working of this new system may be derived from the first volume of reports of cases decided by this court, which was published a month or two since, and is entitled the "Criminal Appeal Reports." This volume covers the period from May 15 to December 22, 1908, and contains reports of about seventy cases.

The first thing to strike the attention is that, except on questions of law when leave of the court is not necessary, it is not easy to get a case before the court. It appears that about sixty-one applications for leave to appeal were refused or dismissed as against about fifteen granted. This suggests that there were either a great many frivolous applications or the court is reluctant to grant leave to appeal.

Having gotten before the court, the prospect of the average convicted defendant is not encouraging. The appeal was dismissed in about fifty-five cases, and in one case the sentence was increased. But that the court is serving a useful purpose in correcting errors is shown, however, by the fact that the conviction was quashed in eighteen cases, the verdict quashed and the defendant committed as a criminal lunatic in one case, the sentence reduced in nine cases, and the sentence to hard labor quashed and a sentence to detention in an inebriate reformatory substituted in one case.

What seems to be a serious defect in the law is that the court does not have the power to order a new trial. The court may quash the conviction or verdict, increase, reduce, or modify the sentence, or dismiss the appeal, but it cannot order a new trial. Notwithstanding that the court has power to take evidence, there must be cases in which it would be desirable to have a new trial. That there occasionally are such cases is pointed out by the court in the case of *Henry Joyce,* 1 Cr. App. Rep. 142.

Some of these cases show that the fears, so often expressed by the opponents of appeals in criminal cases, that appeals on questions of fact would substitute the opinion of the court for the opinion of twelve men who are in a better position to decide questions of fact, were not well founded. That the court does not intend to invade the province of the jury is shown by the "judgment" in the case of *Rex* v. *Williams,* 1 Cr. App. Rep. 1, wherein the Lord Chief Justice said: "There was abundant evidence to go to the jury. The onus is on the appellant to show that the verdict ought not to stand. There ought not to be a retrial where only proper evidence has been left to the jury." In commenting upon this case the *Law Times* said that the decision "clearly demonstrates that where it is a question of which story is to be believed, the prosecution's or the defense's, and there is proper evidence on both sides, the Criminal Appeal Court does not intend to interfere; in fact, it would seem that they intend to apply the rule acted upon in civil actions, that the verdict of a jury will not be interfered with if there is evidence proper to be left to them and the verdict is one which twelve reasonable men might find." 128 Law Times 78.

There is no evidence that the establishment of this right of appeal has or has not impaired the sense of responsibility in juries, but, if we are to accept the London *Times* as authority, the new system has had a salutary effect upon trial judges. The *Times* has said: "Incidentally one may draw attention to an excellent effect of the act. No doubt it has already affected the character and tone of the summings up of not a few chairmen of quarter sessions. Some who were notable for inarticulate wisdom, or who expressed themselves with haste and not always impartially, are now more circumspect. The shorthand writer is a restraint upon some who before knew none. We do not suggest that before the act cases of injustice were common; the contrary is the fact. But there were too often somewhat offhand, it might be indecorous, ways of dealing with difficult or doubtful cases. One effect will be a general leveling up of the judicial standard, especially at a quarter sessions in remote parts of the country. No doubt the effect of the shorthand writer will be felt beyond even quarter sessions."

When we look back upon the long struggle in England to secure a right of appeal in criminal cases, when we recall the terrible wrong done in the Beck case, which outraged the sense of justice of every right-thinking person not only in England but throughout the civilized world, and when we are confronted with this act of the British Parliament, constituting as it does a virtual admission that the old plan was wrong, we cannot but feel that, until this new system has been fully and fairly tested and found wanting, all proposals, no matter how eminent their sponsors, to strike the right of appeal from our criminal procedure must fall upon unheeding ears.

THEODOR MEGAARDEN.

QUALIFICATIONS OF PROSECUTING ATTORNEYS.

STRANGE though it may seem, in most of our State constitutions there are no provisions requiring that persons, in order to be eligible to hold the office of "State's attorney," "county attorney," "district attorney," or "prosecuting attorney," shall be attorneys at law, or admitted to practice in the courts of the State as such. That the failure to provide proper qualifications for an office, the proper discharge of the duties of which calls for the exercise of peculiar learning and skill, is unwise, is not only recognized by the courts (*State* v. *Clough,* 23 Minn. 17), but is also evident from the lack of uniformity in the decisions of the courts on the question of the eligibility of persons not attorneys at law, and of disbarred attorneys, to hold the office of prosecuting attorney.

In the recent case of *Danforth* v. *Egan,* (S. Dak.) 119 N. W. Rep. 1021, which was an election contest case, it was held that an attorney licensed to practice in the courts of the State, who had been disbarred and whose license to practice had been revoked, could not qualify for and hold the office of State's attorney. The effect of the disbarment, it was held, was to deprive the attorney of every privilege to which his license had entitled him, including the right to appear as an attorney in any of the courts of the State; and this being so, and the main duties of the office of State's attorney requiring appearance in the courts of the State, the court said "it would seem axiomatic, too plain for argument and serious contention, that one who cannot perform the duties of an office cannot qualify therefor." The court also considered the question whether the disbarred attorney could rightfully claim that he came under the requirements of the constitution regarding qualifications for the office. The constitution provides that the State's attorney shall be learned in the law, and says nothing regarding admission to practice. The use of the word "attorney" in the name of the officer was considered by the court in the light of a statute enacted prior to

the framing of the constitution, which provided specifically that the State's attorney should be a person duly admitted to practice as an attorney in some court of record in the State; and also in connection with the meaning given to it by other statutes and by law writers; and the conclusion arrived at was that by the use of the word "attorney" in naming the officer State's attorney, the framers of the constitution precluded any contention that the office could be held by any person, no matter how "learned in the law," if he had not been admitted to practice as an attorney and was not licensed as such when he sought to qualify.

This conclusion, in so far as it is based upon the provisions of the statute above referred to as to the qualifications of a State's attorney, is hardly in accord with a prior ruling of the same court in *Howard* v. *Burns*, 114 S. Dak. 383. In that case, which was a proceeding in mandamus by a State's attorney to compel the board of county commissioners to recognize him as such State's attorney, and to compel it to draw a county warrant for salary to which he claimed to be entitled, it was insisted that, under the provisions of the statute above mentioned, the State's attorney was ineligible to the office in that he had not been "duly admitted to practice as an attorney in some court of record" in the State. The court held that the provisions of the statute could not control or affect the constitutional provision, and that it was not competent for the legislature to add to or take from the qualification made by the constitution. The question whether the word "attorney," used in the name of the office in the constitutional provision, meant only such a person as had been admitted to practice as an attorney, was not discussed in the Howard case.

In cases in other jurisdictions, however, wherein the right of a person, not admitted and licensed as an attorney, to hold the office of district or prosecuting attorney was involved, the word "attorney" has received a construction similar to that placed upon it in the Danforth case. Thus, in *People* v. *May*, 3 Mich. 598, the court said: "Now the word *attorney*, when used in connection with the proceedings of courts, and the authority to conduct business in them, as well as when employed in a general sense with reference to the transaction of business usually and most necessarily confided to members of the legal profession, has a fixed and universal signification on which the technical and popular sense unite. The legislator and the judge, the lawyer and the layman, understand it alike as having reference to a class of persons who are by license constituted officers of courts of justice, and who are empowered to appear and prosecute and defend, and upon whom peculiar duties, responsibilities, and liabilities are devolved by law in consequence." See also *People* v. *Hallett*, 1 Colo. 352.

The construction placed upon the word "attorney" in the foregoing cases seems to comport with the better reasoning, and, in the language of the court in the Michigan case, solves the question in such a manner "as to protect the public interests, and especially to preserve the criminal jurisprudence of the State from possible utter prostration." There are, however, other cases which hold that, in the absence of constitutional or statutory provisions setting forth the qualifications for the office of prosecuting attorney, a person not an attorney at law or admitted to practice as such may qualify for, and hold the office of, prosecuting attorney. *People* v. *Dorsey*, 32 Cal. 302; *State* v. *Clough*, 23 Minn. 17. In the California case, the court said: "It would be going a great way beyond any rules of construction with which we are acquainted to hold that a mere name given to an office *ex proprio vigore* defines also the qualifications of the officer. Under such a doctrine, no one but a surveyor would be eligible to the office of surveyor-general, no one but a printer would be eligible to the office of State printer, no one but a pedagogue would be eligible to the office of superintendent of public instruction, and no one but a bibliomaniac would be eligible to the office of State librarian. To so hold would be to accord more meaning to a name than was accorded by Juliet, and to afford a new test of official qualifications." The court also made the following observations, showing that many persons who have exercised judicial functions have not been lawyers: "The earlier chancellors of England were ecclesiastics, not lawyers. Many members of the High Court of Parliament are not lawyers, much less licensed attorneys. So of the Court of Errors, which was once the court of last resort in the State of New York. So of the earlier judges of New Hampshire. Chief Justice Ware was a theologian, not a lawyer; one of his associates was a physician, and the other a farmer. After the Revolution, the Court of Common Pleas in that State was presided over by Dudley, who was a farmer, Langdon, who was a merchant, and Farrar, who was educated for the pulpit and not the bar. Justices of the peace are rarely lawyers or licensed attorneys. Sometimes in this State men who were neither lawyers nor licensed attorneys, to the personal knowledge of members of this court, have filled the office of county judge, yet no one ever questioned their eligibility."

The doctrine of the Minnesota and California cases has been applied in *State* v. *Swan*, 60 Kan. 461, wherein it was held that the disbarment of a lawyer who, at the time of the revocation of his license, held the office of county attorney, did not revoke his agency as a servant of the State or depose him from the office of county attorney; that the cause of his disbarment was not a material consideration, and that, while he was no longer an officer of the court, he was still an officer of the county.

Another and a somewhat interesting phase of the Danforth case is the construction which the court placed upon the phrase "learned in the law," in considering the contention of the disbarred attorney that, being "learned in the law," he met the requirements of the constitution, and, therefore, was entitled to hold the office of State's attorney. The court said that "to be learned in the law one certainly must be learned in all those branches of the law which have at all times been recognized as essential in order to qualify one to practice as an attorney, and to be admitted as such;" that "he must not only be versed in the books of the law, such as those on contracts, torts, evidence, domestic relation, etc., but it is even more important that he be well based upon those rules of conduct which as a lawyer and practitioner should control his relations with his fellow lawyers, his clients, witnesses, and jurors in court, and the public in general." It was also said that knowledge of this branch of the law, commonly known as "legal ethics," has long been recognized as the most important qualification for one who is to be intrusted with the sacred duties of an attorney at law. It appearing from the judgment in the disbarment proceedings that the disbarred attorney had done many things which showed either gross ignorance of, or wilful disregard of, the laws of legal ethics, it was held that the attorney would not be heard to claim that he knew his duties and the ethical rules which should have controlled his actions, and intentionally disregarded the same, but that the law in its kindness would conclusively presume that he performed those acts which caused his disbarment in ignorance of his duties and of the rules of ethics, and would therefore say that no matter how well versed he might be in many branches of the law, yet being ignorant of its most important branch, he was not "learned in the law."

While it is very generally provided as a condition precedent to admission to practice as an attorney at law that a person applying for admission shall possess the qualification of a good moral character, yet this qualification can hardly be regarded as in the nature of an educational test. Legal ethics is not considered a required branch of study in the law schools, and persons applying for admission to practice as attorneys are not

questioned in bar examination as to their knowledge of the rules of this subject. Therefore, the construction placed upon the phrase, "learned in the law," in the Danforth case, seems rather too broad and far-fetched, and is not in accord with expressions found in *Howard* v. *Burns*, 14 S. Dak. 383, wherein the condition of good moral character is not regarded as being included in the phrase "learned in the law." The case of *Brown* v. *Woods*, 14 Okla. 601, however, lends some weight to the view taken in the Danforth case.

GEO. P. WHITMAN.

THE INTER-RELATIONS OF THE MEDICAL AND LEGAL PROFESSIONS.*

TIME was when medical testimony in courts of law was received as little, if anything, more than mere professional or individual opinion and was not very seriously entertained by either judge or jury in any kind of cases. Parenthetically, I might remark that we physicians sometimes are led to feel that the same conditions are still in vogue. It is evident, however, that a gradual change has been working, owing largely to the growing perfection of the exact sciences, and the better adaptation of them that medicine is constantly making. So that at the present time practitioners of law are becoming more and more dependent on the medical profession for certain kinds of technical information which must be used in the shape of legal evidence. Professionally, at least, the relation between the two professions is one of utility; and it is not truly a reciprocal one. Medicine finds no such professional dependence upon the science and practice of law as does law on the science and practice of medicine. In an ethical way, however, the medical fraternity craves the assistance and support of the members of the legal profession. The existence of this society and others of its kind may be accepted as evidence that there is a basis on which the two professions may and will work together for mutual benefit. The most practical opportunity for such united effort is in the direction of improving and maintaining the standards which shall control the two professions in their professional relations. Considering these standards, we of the medical profession feel that there is room for improvement in many instances. Yet our familiarity with the history of forensic medicine reminds us of the long contests by which some of the present methods have been attained; and we are admonished thereby that a patient diplomacy must characterize our earnestness in this cause. The viewpoints of law and medicine are often essentially different when it comes to a question of adjusting some of the rights and privileges of individuals and of society. The difficulty of focusing these variant opinions on some important issue has become historic in a number of memorable instances. If it were not too time-consuming it would, no doubt, be profitable this evening to review some of these notable struggles. Instead, I shall venture to suggest that as a young society we zealously and guardedly select, for our earlier considerations especially, matters that show the best promise of practical results. Nothing can be more convincing to our friends and more stimulating to ourselves than a growing record of actual attainment. We must thereby furnish our best reason to exist. In keeping with this idea, I venture again to suggest, that if every member would carefully consider some line or subject that appealed to him worthy of immediate consideration among us and submit the same to our programme committee with a brief suggestion as to the manner of presenting it, we would soon be rewarded with fine programmes and definite results. For example, no subject of a forensic kind is more often in the minds of the medical members of the society than the question of experts; the manner of selecting, qualifying, and employing them. As we all know many plans for reform in this direction have been proposed, but as one writer (L. Godkin) remarks: "The trouble with most of them is that they contravene one or all of the three fundamental ideas of our system of criminal trial, to wit, that the judge alone is to be the judge of the law, that the jury alone is to pass on the facts, and that the accused shall be allowed to produce any relevant and competent evidence in his own behalf." These and other considerations, some of which I fear might seem to reflect on my own profession, lead me to feel that there is so little chance of an early improvement in the present methods of selecting experts that this subject may stand aside for more likely matters that should be brought to our consideration. If we content ourselves with first taking up easier problems, so to speak, we may be able thereby to open the way for more difficult ones to follow. To illustrate, the writer, on account of certain personal observations and experiences, believes that there is pressing necessity in this State for some kind of general supervision in discharging patients from insane asylums and other places where insane patients are kept, at least from the public institutions of this kind. If a commission for this purpose could be established, several secondary reforms or improvements over present conditions might eventually be made to follow. The right kind of reports from such a commission would possibly influence the legislature more than any other pressure to appropriate sufficient funds to properly segregate certain classes of the inmates of our asylums. Our State needs badly a separate institution for the criminal insane and another for epileptics. It is almost criminal — from a medical standpoint — that these places are not now in existence. Again, this proposed commission of supervision, if its work were well done, might in time pave the way for a general commission on insanity, from which experts could eventually be selected with propriety; thus in a gradual and natural way accomplishing a reform which could not be obtained by an attempt at more radical measures. In thinking over the inter-relations of legal and medical bodies, it seems to me that societies of this medico-legal kind more than any other means should contribute to cordial relations between them. To make our society an example in that direction should be our constant ambition.

A higher social aim is to be kept in mind. There is a dignity pertaining to the law which rests on a certain kind of conservatism. The conservatism of medicine, growing from a different class of considerations, rests upon as much tradition as does that of the law. Although the institutions underlying our respective forms and codes are not parellel and do not always appeal fully to those of the other guild, yet we should always mutually respect them, for only thus can we carefully question them. To find how closely we can get together on certain questions in the private atmosphere of our medico-legal society will be a pleasant experiment. Why may we not create a medico-legal ethics that shall be broader than either legal or medical ethics and yet quite as definite in its purposes? In our awfully free America there has always existed so much prejudice against professional forms and customs that many of us lose sight of what they often stand for. Because they have been and may become the tools of tyranny or a cloak of maliciousness, we are too ready as a people to listen to the demagogue or the puritan who would annihilate them all. The relations of individuals in the practice of law can only be maintained by a code of honor, and a similar unwritten code controls certain relations of medical practitioners. Before the public and for public effect we are too often careless about the observance of conventionalities that should be sustained. A better under-

* Read before the St. Louis Medico-Legal Society, March 12, 1909, by Frank R. Fry, A. M., M. D.

standing of each other's efforts and a greater confidence in each other will be the result of more frequent meetings of the two professions to consider together matters of mutual interest. I hope that this society may succeed in making its work so attractive that it may some day be able to extend its influence by interesting meetings to which members of our two professions may occasionally be invited in numbers.

It would seem that the society is beginning its existence at an auspicious time for especial usefulness. Interest in civic improvement was never greater in our community than at the present time. Our charter revision promises to be an absorbing theme within the next few months — in fact, it will be until something is accomplished in this direction. We should be alert to keep in touch with these movements, as well as others, which mark an era of advancement in our local social conditions. I believe we have a rare opportunity. If so, we should be careful to utilize it. In so doing it is not impossible that we may furnish an example of combined usefulness that has never been elsewhere produced, and that could not be accomplished by either side of us working separately.

Cases of Interest.

LIABILITY OF STOREKEEPER FOR INJURIES TO PERSON SLIPPING ON BANANA PEEL. — In De Velin *v.* Swanson, 72 Atl. Rep. 388, the Supreme Court of Rhode Island holds that a storekeeper is not liable for injuries sustained by a person who slips on a banana peel in the store, unless it is shown that the storekeeper had notice of the fact that the peel was on the floor or that it had been there long enough for such notice to be implied.

ACQUISITION BY CORPORATION OF MAJORITY OF STOCK OF ANOTHER CORPORATION AS VIOLATION OF SHERMAN ANTI-TRUST ACT. — In Bigelow *v.* Calumet & Hecla Mining Co., 167 Fed. Rep. 721, the United States Circuit Court of Appeals of the Sixth Circuit holds that the acquisition of control by the Calumet & Hecla Mining Corporation in the State of Michigan of the majority of the stock of a rival mining corporation of the same State is not an illegal combination in restraint of interstate commerce in violation of the Sherman Anti-trust Act, even though the product of the two corporations goes, for the most part, into the stream of commerce with other States and the stock control results in a monopoly in the single State.

CHARGING CORPORATION WITH BRIBERY AS LIBELOUS PER SE. — In Kimble & Mills of Pittsburg *v.* Kaighn *et al.*, 115 N. Y. Supp. 809, the New York Appellate Division Court of the First Department holds that a published statement that a corporation has bribed the solicitor of a business firm is not libelous *per se* as such statement would be if made against an individual, and that an action by the corporation for such libel cannot be maintained without an allegation of special damages. The view taken is that since a corporation has no character to be affected by a libel and no feelings to be injured, a defamatory statement concerning it, to be libelous *per se*, must be such as directly to affect the credit or property of the corporation and occasion it pecuniary injury. Such an injury is held not to follow directly or necessarily from the charge of bribery. Houghton, J., dissents.

RIGHT OF WIFE UNDER MARRIED WOMEN'S STATUTE TO SUE FOR ALIENATION OF HUSBAND'S AFFECTIONS. — In Sims *v.* Sims *et al.*, 72 Atl. Rep. 424, the Supreme Court of New Jersey holds that the statute of that State entitled "An Act for the protection and enforcement of the rights of married women," and providing that "a married woman may maintain an action in her own name and without joining her husband therein, for all torts committed against her, or her separate property, in the same manner as she lawfully might if a *feme sole*," confers upon married women no right that did not exist prior to its enactment, and that inasmuch as no right of action existed at common law in favor of the wife for the alienation of her husband's affections, no such action can be maintained under the statute. The words of the statute, "torts committed against her," are held not to include all wrongful acts but only those for which the wife may demand legal redress.

FAILURE TO DESTROY CHECK ACCORDING TO AGREEMENT AS LARCENY. — In People *v.* Shattuck, 87 N. E. Rep. 775, the New York Court of Appeals passed upon the sufficiency of the evidence to sustain a conviction for larceny under the following facts: The defendant, a real estate agent, was paid a $200 check as commissions in a real estate transaction and gave a receipt therefor. The defendant and the drawer of the check then agreed to play a game of chance to decide which of them should pay for supper for those present, and the defendant got "stuck." He said he had no money and asked the drawer of the check for a loan and received twenty dollars in cash. He then said he would destroy the $200 check, and, pretending to do so, tore up something and threw it into the waste basket. He was then given another check for $180. The $200 check was not destroyed but was duly presented at the bank and paid. On a prosecution for the larceny of that check it was held that while the defendant might have been guilty of the larceny of the $180 check as having obtained it by the false pretense of destroying the $200 check, he could not be guilty of the larceny of the check first given, as that was his own property.

DOCTRINE OF TURNTABLE CASES AS APPLICABLE TO OPEN FLUME. — In Salladay *v.* Old Dominion Copper Mining and Smelting Co., 100 Pac. Rep. 441, the Supreme Court of Arizona holds that the doctrine of the so-called "Turntable cases," under which the owner of an unguarded turntable or other exposed and dangerous machinery attractive to children is liable for injuries to children of tender years received while playing about such machinery, should not be extended to cover the case of a child playing about and falling into an open flume or ditch carrying running water. It is pointed out that the turntable doctrine as announced in Sioux City, etc., R. Co. *v.* Stout, 84 U. S. 657, and subsequent cases, does not announce a new rule of law but an innovation upon the theretofore accepted rule that a landowner is not liable for the visible condition of his premises to one who enters them without permission, and that while there may be no logical distinction between a turntable and an open flume, the doctrine of the Stout case should be confined to conditions wherein the landowner has neglected some usual or customary precaution, or where the danger to be guarded against is temporary or unexpected, or not entirely open to observation.

MISREPRESENTATION AS TO INTENDED USE OF PURCHASED REAL ESTATE AS FRAUD. — In Adams *v.* Gillig, 115 N. Y. Supp. 999, the New York Appellate Division Court of the Fourth Department holds that where the grantee of a deed containing no restrictive clause as to buildings represents to the grantor that he intends to use the property for dwelling houses and for no other purpose, when in fact he intends at the time to erect a garage thereon and immediately proceeds to do so, the representation is equivalent to a misstatement of an existing fact so as to avoid the deed on the ground of fraud. The court holds that the rule that fraud cannot be founded upon a promise not performed, even if the promisor never intended to fulfil the same, is not applicable to the representation before the court, and says: "This statement was in no sense a promise. It was a statement of a present existing intent, and we see no reason why it was not as much an existing fact as any other fact that could be made the basis of a charge of fraud. The purpose of the state-

ment was to deceive and defraud, and it accomplished such purpose. There is no decision in this State bearing upon this precise point, but it is reasonable to hold the defendant liable for this fraud." Presiding Justice McLennan delivered a dissenting opinion.

LEAVING MOTOR TRUCK WITH POWER SHUT OFF AS NEGLIGENCE. — In Vincent *v.* Crandall & Gadley Co., 115 N. Y. Supp. 600, the New York Appellate Division Court of the Second Department holds that it is not negligence to leave an electric motor truck in a street, unattended, with the power shut off. The truck in question was in charge of a licensed chauffeur, who was engaged in the delivery of goods. He stopped the truck on a street in the city of Brooklyn in front of a store where he was delivering goods, and after disconnecting the power by throwing back the controller, and disconnecting the batteries, he left the machine, set the brakes, and went into the store to deliver the goods.. He remained in the store ten or fifteen minutes, and while in there the machine was started by the wilful act of some mischievous boys who got upon the truck, and by moving the switch and controller caused it to run into the plaintiff's drug store, inflicting the damage for which recovery was sought. It appeared that the power was shut off in the usual way and that nothing more could have been done to render the machine inert short of dismantling it. It was held that the act of the boys, and not leaving the truck unattended on the street, was the proximate cause of the damage, and that the owner of the truck was not liable.

VALIDITY OF INDIANA "FULL CREW" STATUTE. — In Pittsburg, etc., R. Co. *v.* State, 87 N. E. Rep. 1934, the Indiana Supreme Court holds that the "full crew" statute of that State, requiring railroad companies to have six employees on freight trains of more than fifty freight cars, and five employees on freight trains of less than fifty cars, and that there shall be on passenger, mail, or express trains five employees other than the baggage and express messengers, is, as applied to interstate trains operating in the State, a valid regulation, within the police power of the State, as designed to protect life and property in the State. It is held that the statute is not an attempted regulation of interstate commerce and that the subject of the statute is one which the State may properly control in the absence of any act by Congress dealing therewith. It is also held that the several existing Acts of Congress requiring cars in interstate trains to be equipped with automatic couplers; regulating the adjustment of controversies between interstate railroads and their employees; requiring reports of accidents; limiting the hours of service of employees, etc., do not show an intention on the part of Congress to enter the field of legislation relating to the number of employees to be carried on trains operated within the State though engaged in interstate commerce, and that this field of legislation is left open to the States.

RESPECTIVE DUTIES OF STREET CAR AND AUTOMOBILE STALLED ON TRACK. — In Lawrence *v.* Fitchburg, etc., R. Co., 87 N. E. Rep. 898, the Massachusetts Supreme Judicial Court had occasion to consider the liability of a street car company for a collision by its car with an automobile which was stalled in the night time close to the company's track. There was evidence from which the jury might have found that the rear light on the automobile was burning and that the front lights shone back to the rear in the direction from which the street car was coming, that the street car came on very rapidly, at from twenty-five to thirty miles an hour, and that its speed was not noticeably reduced at the time of the collision. It was held that it could not be said as a matter of law that the defendant's motorman was free from negligence, and that while he was not bound to anticipate that any one would be driving upon the car track outside of the traveled part of the road, the jury might find that the exigencies of travel, and the duty of turning out for other vehicles, might at any time bring a carriage or automobile dangerously near the track and make it the duty of the motorman to look out for such vehicle and keep the car under such control that a collision could be avoided. The judgment of the lower court for the damage done the automobile in the collision was therefore affirmed. It was also held, in accordance with the judgment below, that the occupants of the car who saw the street car coming five hundred feet away and remained in the machine without warning the motorman, trusting solely to his seeing the automobile in time to avoid a collision, were guilty of negligence defeating any right of recovery for their personal injuries.

VALIDITY OF CHICAGO ORDINANCE REGULATING EXHIBITION OF MOVING PICTURES. — In Black *et al. v.* City of Chicago, 87 N. E. Rep. 1011, the Illinois Supreme Court holds that the ordinance of the city of Chicago making it unlawful to engage in the business of exhibiting moving pictures without first securing a permit from the chief of police of the city after exhibiting to him the films of the pictures to be displayed, and providing that the chief of police shall not issue a permit for the exhibition of any obscene or immoral picture or series of pictures, is not invalid as discriminating against persons engaged in the exhibition of moving pictures and in favor of other persons exhibiting immoral or obscene stereopticon or other stationary pictures, or immoral theatrical performances. The exhibition of moving pictures is held to be a separate branch of the amusement business and different from the theatre business or that of exhibiting stationary stereopticons, by reason of the fact that the films for moving pictures are rented and constantly changed from one exhibition to another, so that inspection of every place of business would be much more difficult than the inspection of stationary pictures, and because the exhibition of a theatre show before the police to obtain a permit would not be feasible. The ordinance is also attacked as a delegation of legislative and judicial powers to the chief of police by giving him authority to determine whether a picture or series of pictures is immoral or obscene, but it is held that the ordinance is not objectionable on this ground, since a legislative body may authorize administrative officers to decide questions which it cannot understandingly or advantageously decide.

LIABILITY FOR INJURIES CAUSED BY KICK OF MULE. — In Tolin *v.* Terrell, 117 S. W. Rep. 290, the Kentucky Court of Appeals reversed a judgment for the plaintiff for injuries occasioned by the kick of a mule. The mule in question belonged to the plaintiff and had been driven on the ferryboat of the defendant. As the plaintiff was behind the mule picking up the lines which had dropped to the floor, a horse, at least three feet away and used by the defendant to operate a treadmill which propelled the boat, bit the mule, whereupon the mule kicked the plaintiff and severely injured him. The defendant's theory was that the mule kicked because of the manner in which the plaintiff raised the lines. It was contended by the plaintiff that the defendant was negligent in not having a screen between the treadmill horse and the driveway where the mule was stationed. The court held that the defendant could not reasonably have anticipated that because of the absence of a screen the horse would bite the mule and cause the latter to kick. It was also held that the plaintiff was guilty of negligence in going behind the mule in the way he did, the court saying: "In spite of the fact that there was testimony to show that his mule was of so gentle a disposition that children could play at its heels, it is a matter of common knowledge and common experience that there is no telling when or under what circumstances a mule will or will not kick. The only way to escape danger from the feet of a mule is not to go within the radius of its heels. He who goes within these limits

assumes the risk of being kicked; and especially so when, without warning to the mule, he picks up the lines, which have been lying on the floor, passes them across the mule, and attempts to tie them at the brake."

New Books.

A HISTORY OF NEW YORK COURTS.

The Courts of the State of New York — Their History, Development, and Jurisdiction. By Henry W. Scott, of the New York Bar. Pp. 506. New York: Wilson Publishing Co., 1909. Buckram $5.00, morocco $6.00.

This work, which is dedicated to the Bench and Bar of the State of New York, purports to be a complete history of the tribunals of justice of that State from the first settlement of Manhattan Island to the present year, and to be the only treatise in existence which attempts to cover this ground.

The analytical treatment of the subject is not to be unreservedly commended. The book is divided into three parts, the first dealing specifically with the colonial period, from the Dutch settlement to 1777, and the second with the constitutional period, from 1777 to 1909, while Part III. purports to be a "general review" or "chronological compilation" of the history of each court from its establishment to the present year or to its abolition if that has taken place. This method of treatment necessarily results in considerable repetition of subject-matter. In Parts I. and II. all the courts are discussed rather indiscriminately, the intent evidently being to make the treatment strictly chronological with regard to the whole judicial system rather than with regard to particular courts; in Part III. all of the same courts are again discussed chronologically, but a separate treatment is accorded to each particular court. Moreover, even this analysis is not always consistently pursued, specific treatment of particular courts being given in a number of chapters in Parts I. and II. Thus, in Part I. we find the following arrangement of chapter headings, the logical sequence of which is difficult to discern: "Status of Law in the Province of New Netherlands under the Dutch;" "Early English Sovereignty;" "Courts Established by Hempstead Convention;" "Court of Assize;" "Nicolls to Dongan (1673–1683);" "Progress of Law under Gov. Dongan;" "Governor Sloughter;" "The Supreme Court;" "Court of Chancery," etc.

Notwithstanding defects of analytical treatment, however, and despite certain crudities of style, Mr. Scott has made a readable book — one which will afford much entertainment to its owner and impart more than a little new knowledge to the average lawyer. How many readers of this review, for example, know anything about the tribunals entitled the Body of Nine Men, the Burgher and Schepens Court, the Patroons' Court, and the Court of Schout, Burgomasters, and Schepens? All of these and others existed under the Dutch rule in New York, and their influence is discernible at a much later day.

Under the English administration were early established the Court of Assize, the Courts of Sessions, the Mayor's Court, and others, and the jury system was introduced. Two volumes of the records of the Court of Assize are now extant — one covering the period from Sept. 28, 1665, when the court first convened, to Dec. 7, 1672; the other from Oct. 6, 1680, to Oct. 6, 1683. This court was finally abolished in 1684. The underlying elements of the Supreme Court, as at present constituted, are to be found in this court and the Court of Oyer and Terminer, instituted in 1683. The Supreme Court was established by the General Assembly of 1691, and has continued practically without intermission until the present time. The first salary paid to the chief justice of this court, in 1698, prior to which time he served without remuneration, was one hundred and thirty pounds per annum.

Among the Dutch, we are told, lawyers as a class or profession were almost unknown, and litigants were accustomed to appear and plead in person. Later, among the English, while attorneys are mentioned in the records of the Court of Assize, neither the early magistrates nor those who occasionally appeared before them on behalf of parties to a trial were lawyers in the primary signification of that term. In fact, lawyers were for a long time the objects of popular distrust and dislike.

The volume is more a lawyers' book than a law book, and lawyers will be inclined to criticise the almost entire absence of citations of authority to substantiate the author's statements of fact. On page after page assertions are made apparently on the author's own responsibility. They may be accurate, but the author has left the burden of proof on himself.

The book is printed from clear type, on good paper, and it is a pity that it is marred by an inexcusable profusion of typographical errors.

News of the Profession.

THE LOUISIANA STATE BAR ASSOCIATION held its annual meeting at Alexandria on May 28 and 29. Particulars of the meeting will be given in this column next month.

APPOINTED TO ARIZONA COURT. — The celebrated Doe family is to be represented on the Arizona bench. On May 8 the President nominated Edward M. Doe to be an associate justice of that Territory.

PROMINENT COLORADO LAWYER DEAD. — George W. Bailey, a former justice of the Colorado Supreme Court and one of the best-known attorneys in the State, died on April 16 at Fort Collins, Colo., at the age of fifty-three.

APPOINTED TO ALASKAN JUDGESHIP. — Thomas R. Lyons was on April 15 nominated by President Taft to be United States district judge for the First District of Alaska. The nomination had been held up on account of charges against the nominee, but on investigation these charges were found to be baseless.

JOHN M. GOULD DEAD. — John M. Gould, author of the well-known work on "The Law of Waters" and other legal works, died in Boston on April 15, aged sixty-one. Mr. Gould retired from active practice about twenty years ago.

COOLEY FOR NEW MEXICO BENCH. — Alford M. Cooley, a prominent member of President Roosevelt's "tennis cabinet," has been appointed an associate justice of the New Mexico Supreme Court. He was Assistant Attorney-General under the last administration.

NEW FEDERAL JUDGE FOR WASHINGTON. — George Donworth, of Seattle, was on May 8 nominated to be United States district judge for the newly created Western District of Washington. Mr. Donworth is one of the leading lawyers of Washington and was formerly in partnership with Senator Piles.

DEATH OF EX-JUDGE DAVY. — Hon. John M. Davy, for sixteen years a justice of the New York Supreme Court, died in Atlantic City on April 21 at the age of seventy-three. He was elected to the Supreme Court in 1888 and served continuously until the end of 1905, when he retired on the age limit.

BEAN MADE FEDERAL JUDGE IN OREGON. — On April 15 the President nominated Judge Robert S. Bean, of the Oregon Supreme Court, to be United States district judge for Oregon. Judge Bean has seen more than twenty years of service on the Oregon bench and has thoroughly demonstrated his qualifications for the position.

CONNOR GETS FEDERAL JUDGESHIP IN NORTH CAROLINA. — The bitter fight over the federal judgeship for the Eastern District of North Carolina was ended on May 11 when President Taft nominated Judge H. G. Connor, of the North Carolina Supreme Court, for the position. Judge Connor has served on the North Carolina court for ten years. He is a Democrat.

GRUBB APPOINTED TO FEDERAL BENCH IN ALABAMA. — William J. Grubb, of Birmingham, was on May 8 nominated for the federal judgeship for the Northern District of Alabama, to succeed Oscar R. Hundley, whose confirmation was defeated by vigorous opposition from the bar of the State. The new judge has the reputation of being a lawyer of great ability.

FRANKLIN BARTLETT DEAD. — Colonel Franklin Bartlett, an attorney of wide reputation, died at his home in New York city on April 23, at the age of sixty-one. After graduation from the Columbia Law School he was admitted to the bar in 1870, and for many years he has been prominent in New York city.

PURDY RESIGNS — WILLARD APPOINTED. — On May 1 Martin D. Purdy resigned his position of United States district judge for Minnesota, and on May 8 the President nominated Charles A. Willard, of Minneapolis, to succeed him. The opposition of the Minnesota senators to Judge Purdy made his confirmation impossible. The new appointee has served with distinction as a justice of the Supreme Court of the Philippines.

NEW HEAD FOR MICHIGAN BAR ASSOCIATION. — At a meeting of the directors of the Michigan State Bar Association held in Detroit on April 20, ex-Circuit Judge Harry A. Lockwood was elected president of the association to succeed F. W. Stevens, who resigned because of his leaving the State. At the same time John W. Beaumont, of Detroit, was chosen vice-president in place of Judge Brown, who has also removed from the State.

DEATH OF NEW BRUNSWICK JUDGE. — Hon. D. L. Hanington, for the last seventeen years a justice of the Supreme Court of New Brunswick and one of the most distinguished men in the public life of the province, died May 6 at his residence in Dorchester, N. B., aged seventy-four. He was called to the bar in 1861, was created a Q. C. in 1881 by the Marquis of Lorne, and in 1892 was appointed a judge of the Supreme Court.

HAWAIIAN JUDGES NAMED. — The President sent to the Senate on April 28 the following nominations: To be United States district judge for Territory of Hawaii, George W. Woodruff, of Pennsylvania; to be associate judge of the Supreme Court of Hawaii, Antonio Perry, of Hawaii; to be second judge of the Circuit Court for the first circuit of Hawaii, William L. Whitney, of Hawaii.

PERSONNEL OF HAGUE COURT. — From London, under date of May 6, comes the announcement that the arbitration court which will sit at The Hague on the fisheries dispute between the United States and Canada will be composed of the following members: Dr. Lamasch, of Vienna, president; Dr. Drago, of Argentina; Dr. Lohman, of the Netherlands; Sir Charles Fitzpatrick, of Canada; and Judge George Gray, of Delaware.

FORMER TENNESSEE JUDGE DIES IN NEW YORK. — Hon. William F. Cooper, who was from 1878 to 1886 a justice of the Supreme Court of Tennessee, died in New York city on May 7, at the age of ninety. Judge Cooper was graduated from Yale in the same class with William M. Evarts. Since his retirement from the bench he had made his home in New York city. He was a brother of Col. Duncan B. Cooper, who was recently convicted for the killing of Senator Carmack.

LANNING SUCCEEDS DALLAS. — On May 6 President Taft sent to the Senate the nomination of United States District Judge William M. Lanning, of Trenton, N. J., to be United States circuit judge for the third judicial circuit, *vice* George M. Dallas, of Philadelphia, retired. Judge Lanning has served on the District Court bench since 1904, having succeeded Judge Kirkpatrick. His successor in that position, also nominated on May 6, is Judge John Rellstab, of Trenton, judge of the Court of Common Pleas of Mercer county.

FRANK T. BROWN, OF CONNECTICUT, DIES. — Frank T. Brown, one of the ablest and most widely-known members of the Connecticut bar, died at his home in Norwich on April 17 of pneumonia. Mr. Brown was born in Norwich and was fifty-six years old. He was graduated from Yale at the early age of nineteen and four years later was admitted to the bar, where he soon secured a commanding position. He was made corporation counsel of Norwich in 1891, and had held that office for the greater part of the time since.

WELL-KNOWN NEW YORKER DEAD. — Charles A. Gardiner, a well-known corporation lawyer and a writer of note on constitutional questions, died in New York city on April 23, aged fifty-three. He was a graduate of Hamilton College and the Columbia Law School. In 1885 he began the practice of the law and in 1888 became a member of the firm of Davies & Rapallo, which had among its clients all the elevated railroad companies in the city. He later became the head of the law department of these companies.

EX-SENATOR TURPIE, OF INDIANA, DIES. — Former United States Senator David Turpie, of Indiana, one of the most accomplished men of his time, died on April 21 at Indianapolis, aged eighty years. He was admitted to the Indiana bar in 1849 and five years later was made judge of the Court of Common Pleas, later becoming judge of the Circuit Court. After serving several years in the State legislature he was, in 1863, elected United States senator. In 1878 he was appointed one of the commissioners to revise the laws of Indiana, and in 1887 he was appointed United States district attorney for Indiana. In the same year he was again sent to the United States Senate.

EX-SENATOR STEWART, OF NEVADA, DEAD. — Although ex-United States Senator William M. Stewart, of Nevada, who died in Washington, D. C., on April 23, at the age of eighty-two, was best known as a politician and an advocate of the free coinage of silver, his career as a practicing lawyer was not without interest. Taking up the study of the law in 1852 he was during that year admitted to the bar and also appointed district attorney of Nevada City. He fought and won the celebrated litigation arising out of the discovery of the Comstock lode, for which he received $500,000 in fees. In the history of Nevada he has always been a prominent figure, and when it was made a State in 1864 he was elected to the United States Senate, where he remained until 1875. In 1887 he returned to the Senate, remaining until 1905.

AMERICAN SOCIETY OF INTERNATIONAL LAW. — The third annual meeting of the American Society of International Law was held in Washington, D. C., on April 23 and 24. The president, Senator Elihu Root, opened with an address on "The Relation between the Jurisdiction of National Courts and International Arbitration," which was followed by a discussion of "Arbitration as a Judicial Remedy." Many persons of note read papers or otherwise took part in the proceedings, among them Rear Admirals Sperry and Stockton, former Secretary of State John W. Foster, Prof. T. W. Aymar, of the New York University Law School, Wayne MacVeagh, and Señor Luis Anderson, late envoy from Costa Rica. Among the speakers at the annual banquet, held at the New Willard Hotel on the evening of the 24th, were Attorney-General Wickersham, Rev. Dr. Lyman Abbott, and Dr. R. S. Woodward. President Root and the other officers were re-elected for another term.

DEATH OF JUDGE W. L. PENFIELD. — Judge William L. Penfield, formerly solicitor of the Department of State and an authority on international law, died in Washington, D. C., on

May 9. Judge Penfield was sixty-three years old and a native of Dover, Mich. He was formerly a judge of the Circuit Court in Indiana. As solicitor from 1897 to 1905 he won the complete confidence of Secretary of State Hay and had a large influence in shaping the policies of the State Department. He was counsel for the United States in the famous "pious fund case," in the Venezuelan arbitration before The Hague Tribunal in 1903, and general counsel of the United States in the Emery claim against Nicaragua. He was counsel for this country in the international arbitration between the United States and San Domingo, Hayti, Nicaragua, Guatemala, Salvador, and Mexico, wherein awards amounting to $2,500,000 were given in favor of the United States. In 1905 he was special commissioner to Brazil.

DATES FOR STATE BAR MEETINGS. — The thirty-third annual meeting of the Illinois State Bar Association will be held in Peoria on June 24 and 25. Among the speakers will be O. H. Dean, of Kansas City, Mo., and Floyd R. Mechem, the well-known law writer. At the thirtieth annual meeting of the Ohio lawyers at Put-in-Bay on July 6 to 8, the annual address will be delivered by Senator Clark, of Wyoming, and Governor Harmon will also speak. The Kentucky association will convene at Paducah on July 7, and the principal address will be delivered by United States Attorney-General George W. Wickersham. The Maryland convention will be held on July 7 to 9, with Mr. Justice Brown, of the United States Supreme Court, as the principal speaker. The meeting of the Virginia association will be held at Hot Springs on August 10 to 12, and that of the Michigan association is scheduled for August 24 to 28 at Detroit, at the time of the meeting of the American Bar Association.

NEW HAMPSHIRE STATE BAR ASSOCIATION. — The adjourned annual meeting of the New Hampshire State Bar Association was held in Manchester on May 10. President Edwin F. Jones occupied the chair and opened the meeting with an address. The principal speaker was William B. Hornblower, of New York, whose subject was "The Code of Ethics Adopted by the American Bar Association." For some sixty members of the association the meeting was enlivened by the derailment of a trolley car in which they were going to attend the annual banquet, held in the evening at Riverside Inn, but aside from a severe jolting none of the party sustained injury. The following officers were elected: President, Judge William M. Chase, of Concord; vice-president, ex-Gov. Chester B. Jordan, of Lancaster; executive committee, William E. Marvin, of Portsmouth, Judge Lawrence V. McGill, of Rochester, Walter D. H. Hill, of Conway, Judge Oscar L. Young, of Laconia, Allen Hollis, of Concord, Oliver W. Branch, of Manchester, Joseph Madden, of Keene, Judge Jesse M. Barton, of Newport, Ira A. Chase, of Bristol, and Edmund Sullivan, of Berlin.

MISSISSIPPI STATE BAR ASSOCIATION. — The fourth annual meeting of the Mississippi State Bar Association was held at West Point on May 4, 5, and 6. Mr. T. B. Kimbrough, in behalf of the local bar, welcomed the visitors and response was made by Mr. F. C. Holmes, of Hernando. This was followed by the usual address of the president, J. S. Sexton, of Hazlehurst. The annual address was delivered by E. T. Merrick, of New Orleans, who dwelt upon the inadequacy of legislation in the Southern States to meet existing conditions. R. N. Miller, of Hattiesburg, read a paper relative to the enforcement of the criminal law and legislation needed in that regard. Other papers were read by Judge Robert B. Mayes, of the State Supreme Court, and J. G. Leftwich, of Aberdeen. The annual banquet was held at the Hotel Holt on the evening of the 5th. The following officers were elected for the ensuing term: President, Thomas H. Sommerville, dean of the law department of the State University; vice-presidents, W. H. Powell, of Canton, Leroy Percy, of Greenville, and W. A. Roane, of Oxford; secretary and treasurer, Judge Sydney Smith, of Lexington. Natchez was chosen as the next place of meeting.

English Notes.

DISTINGUISHED IRISH K. C. DEAD. — Mr. Dennis Baylor Sullivan, K. C., for many years one of the leaders of the Irish bar, died on April 18 in his sixty-fifth year. He was called to the bar in 1873 and took silk in 1889. As a criminal lawyer he soon acquired a great reputation, his defense of Tim Kelly on his trial for the assassination in the Phœnix Park of Lord Frederick Cavendish and Mr. Thomas Burke having drawn wide attention to his ability in that line.

SCOTCH WOMEN WANT TO PRACTICE LAW. — A bill has been introduced in the British Parliament to allow women to practice as law agents in Scotland. The question came up about five years ago and was decided against women in the profession. Since that time the Scotch universities have thrown the doors of their law schools open to women, and now several women trained as lawyers are waiting for permission to practice their profession.

KISSING THE BOOK TO BE ABOLISHED. — The great agitation about "kissing the book" which has so deeply stirred the English press for several years seems in a fair way to be settled by a bill recently introduced into Parliament which requires the oath to be so administered that the person taking it will swear with uplifted hand. Instead of requiring the oath to be taken in the Scottish fashion, the measure provides that the officer administering it shall say: "You swear by Almighty God," proceeding with the words of the oath prescribed by law, and that the person taking the oath shall, with uplifted hand, say, "I do."

THE OLDEST ENGLISH BARRISTER. — The oldest living English barrister is Mr. W. A. G. Hake, who recently completed his ninety-eighth year. Mr. Hake has resided at Brighton for the last forty-five years. He was called to the bar at the Middle Temple in May, 1835. Mr. Hake was in the barristers' robing room when the Princess Victoria was declared Queen. One of the barristers present remarked, "Gentlemen, we have no longer a Court of King's Bench, and very few of us here present will ever live to see another Court of King's Bench." Of all who were present at the time, Mr. Hake is believed to be the only survivor.

RIGHTEOUS INDIGNATION. — Some English judges find it difficult to bid farewell to outworn customs gracefully. In one of the county courts before Judge Willis recently a plaintiff asked to be sworn with uplifted hand. Judge Willis asked if he objected to kissing the book, and the plaintiff replied that he did because he had read in the papers that there was danger of contracting disease. "That is what I thought," said the learned judge scornfully. "I have kissed it a good many times and have never caught anything, for it is a sign of weakness." The plaintiff, much abashed, timidly offered to kiss the book if his honor preferred it, but the indignant jurist waved aside the concession and closed the matter with "Poor man, I hope you will survive." It was Judge Willis who admitted not long since that he had never used a telephone or read a Sunday newspaper.

CORESPONDENT MAY ESCAPE DAMAGES BY SUICIDE. — The decision of the Probate, Divorce, and Admiralty Division in the case of Brydges *v.* Brydges, noted in this column last month, holding that, where a corespondent in a divorce case committed suicide after a decree *nisi* had been rendered against him for

damages but before the decree had been made absolute, his estate was liable, has been reversed by the Court of Appeal on technical grounds. When the decree *nisi* was pronounced an order was made that the corespondent should, within a month, lodge in court the amount of the damages. This order, the Court of Appeal holds, was not a judgment on which execution could issue, and therefore, as there is no provision in the Divorce Act and Rules enabling the executor of a corespondent to be brought before the court, the cause of action, being a personal one, did not survive.

PLAYED IT LOW DOWN ON THE JUDGE. — Once when Baron Bramwell was sitting on the crown side of the South Wales circuit, counsel for the defense in a certain case asked leave to address the jury in Welsh. The case being a simple one, permission was given without demur. He said but very few words. The baron also did not think much comment was necessary, but was somewhat startled by a prompt verdict of acquittal.

"What was it," he afterward inquired, "that Mr. L. said to the jury?"

"Oh, he just said: 'This case, gentlemen, lies in a nutshell. You see yourselves exactly how it stands. The judge is an Englishman, the complainant is an Englishman, but you are Welsh, and I am Welsh, and the prisoner is Welsh. Need I say more? I leave it all to you."

LANDED ON THE DOCTOR. — Lord Morris, the famous Irish judge, was once presiding at assizes at Coleraine during the hearing of an action for horse poisoning, when he was very much amused by the self-sufficient air with which a doctor was giving evidence to the effect that twelve grains of the poison in question could be administered to a horse without fatal consequences. The judge eventually said to the witness, "Tell me this, wouldn't twelve grains kill the devil himself if he swallowed them?" The medico, much shocked at the question, drew himself up in the box in pompous fashion, and replied: "My lord, I have never had the honor of prescribing for that patient." To this Lord Morris — using the broadest of Irish brogues — replied, in a most confidential tone: "Ah! no, dochter, dearh, ye nivir had. Mhore's the pity, for the ould boy's still alive!"

THE CHILDREN'S MAGNA CARTA. — On April 1 there went into force in England a child law which in its scope, comprehensiveness, and humanitarian provisions probably surpasses the most advanced legislation on this subject in any of the American States. The act is designed to protect children against abuse and contamination at all points. One provision which prohibits children from entering public houses has called forth much ingenuity on the part of the public-house keepers in the matter of providing accommodation for offsprings while their forbears are inside dallying with the Demon Rum. Special waiting rooms have been provided for the children and in some cases nurses are provided free of charge. One publican dried out a horse trough and filled it with hay for the reception of babies, who are watched over by a boy provided for the purpose. At another place a cab was observed in front of a saloon doing business as a *crèche*.

BRITISH JUDICIAL HUMOR. — Mr. Justice Darling has long been recognized as the leading humorist on the English bench. He has a habit of enlivening the proceedings before him with such excruciatingly funny remarks that it is a real wonder that any serious business can be transacted at all. The following specimen of his lordship's humor is taken *verbatim* from the London *Daily News:*

Mr. Moresby White (for the appellant) said his client was the owner of Stanage Moor, near Sheffield, and the point raised was whether a farmer had a right to allow his sheep to graze on a grouse moor to the detriment of the owner's shooting. The County Court judge refused an injunction, giving small damages only against the farmer, and the appellant asked that a perpetual injunction should be issued.

Mr. Justice Darling: This migration of the sheep seems a general movement of "back to the land."

Mr. White: My client appreciates that as long as they keep off his land. (Laughter.)

"Do the sheep molest the grouse?" queried Mr. Justice Darling, "and is that why you suggest they have horns?" (Laughter.)

Mr. White: The grouse like the sheep; there is a kind of affection between them. (Laughter.)

Mr. Justice Darling: Then the sheep go to visit the grouse? (Loud laughter.) If you succeed with your argument we will have people coming to the court asking for injunctions to prevent grouse from flying over farmers' lands. (Laughter.)

In giving judgment his lordship said he thought it would be necessary to introduce obese or inactive cattle into Yorkshire, so that they would not wander on the moors. (Laughter.) For, said his lordship —

> Mountain sheep are sweeter
> And valley sheep are fatter,
> We therefore thought it meeter
> To cultivate the latter.

(Loud laughter.)

It was much more needful, he thought, to have an agricultural population than have grouse to shoot — if they ever could shoot them. (Laughter.)

THE NEED FOR CODIFICATION. — American lawyers and lawmakers may find some food for thought in the following editorial from a recent number of the London *Law Journal:* "The enormous growth of the statute law emphasizes the need for codification, or at least for consolidation. It has generally been advanced in favor of our uncodified judiciary law that it has greater consistency and coherence, and also greater elasticity, than a code would possess. These pleas, however, cannot be advanced in favor of that part of the law which is dispersed among a number of statutes emanating from different epochs and expressed in very varied terms. Nor, indeed, can they be maintained in favor of a legal system, such as ours is to-day, which is partly based on case law and partly upon statutes, and in which the statutory is continually gaining upon the judge-made part. It is quite clear that such a system must lack that certainty which a good code would possess. It is difficult enough for the specialized lawyer to find out what is the exact state of the law upon many questions; it is impossible for the layman to do so. The present government has set a good example by carrying through Parlia-

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ment a number of consolidating statutes which bring together the whole of the statute law upon certain large subjects, such as companies, children, agricultural holdings, and marine insurance. But much work of the same kind remains to be done. The law of public health, which is at present a veritable chaos; the copyright laws, which are a tangled and inconsistent jumble; the revenue laws, which are so complicated that it almost passes the wit of judges to understand and apply them; and the law of private trusts, on which a House of Commons committee reported last year, cry out particularly for consolidation and simplification. When this preliminary work of consolidation has been more thoroughly accomplished it will be time to proceed to the larger task of codifying, if not the whole, yet large divisions of the law. As has recently been pointed out, codification would be good not only for the law, but also for lawyers in that it would make decentralization feasible; for it is the complicated and involved condition of the law which to-day necessitates specialization, and specialization necessitates centralization."

Obiter Dicta.

A HARD CASE. — The court must have found considerable difficulty in deciding the case of Justice *v.* Justice, 3 Ired. (N. C.) 58.

A NATURAL SEQUENCE. — In Taylor's Law Glossary the phrase "*incendit et combussit*" is translated "he sat on fire and burnt up."

A POPULAR DELUSION DISPELLED. — In the Montgomery Circuit Court at Mount Sterling, Ky., recently a jury composed exclusively of attorneys arrived promptly at a unanimous verdict.

THE WAY IT SOUNDS TO US. — "Does it sound sensational to declare that American law, to a very large extent, makes for injustice?" asks *Collier's Weekly*. Not only sensational but distinctly yellow.

AN EASY MARK. — A New York restaurant keeper by the name of Egg has recently obtained permission from the courts to change it. One can readily imagine what a life the poor man must have led.

HARD LUCK. — Out in Portland, Oregon, the other day a plaintiff suing for damages for the death of his son refused an offer to compromise for $3,500, although strongly urged to accept it by his counsel. The jury gave him nothing and he was stuck of the costs besides.

WILLING TO TAKE A CHANCE. — The burly prisoner stood unabashed before the judge. It was his first time in a court and before a jury. "Prisoner at the bar," asked the clerk, "do you wish to challenge any of the jury?"

The prisoner looked them over carefully and with a skilled eye.

"Well," he replied, "I'm not exactly wot you calls in training, but I guess I could stand a round or two with that fat old geezer in the corner." — *San Francisco Argonaut.*

A NICE POINT OF CRIMINAL LAW. — An anxious inquirer wishes to know if it would be any infraction of the criminal law to sit in the front row at a band concert and suck a lemon. We must confess our inability to refer him to any precedent on the point, but perhaps some of our readers can throw some light on the subject. Such conduct would certainly prove exceedingly disconcerting to the gentlemen who perform on the wind instruments, and might very possibly pave the way for a breach of the peace.

AS SHE IS WROTE. — In Folts *v.* State, 118 N. Y. 409, Potter, J., said: "But it would seem to be harder still that a claimant, whose entire claim was rejected upon the statute of limitations, if the respondent should now be allowed to defeat the portion of the claim which the statute of limitations cannot defeat, by having the appeal dismissed for the reason that that portion of the claim does not amount to $500, and that, too, in a case between the citizen and the State standing *in loco parentis.*"

A GENTLEMAN OF THE OLD SCHOOL. — The following appeared in a recent issue of the Spokane, Wash., *Press:*

TO WHOM IT MAY CONCERN.

Any person contemplating or about to commence a law suit will do well to call and see M. T. O'Connor, Room 505, fifth floor Hyde block, who can give you good sound legal advice in any matters pertaining to law or equity. O'Connor is a gentleman of the old school, whose advice is sound in law matters, but my advice in advance is for any person that can avoid it to let law alone, as it is a very expensive luxury to deal in, more especially when you fall into the hands of shysters and pettifoggers, who are more numerous than lawyers in good standing.

Yours with respect,
M. T. O'CONNOR, B. A. L.

SOCIETY NEWS. — A correspondent writes that, during the trial of a case of forcible entry and detainer before Esquire Knapp in the city of Waterloo, Iowa, Miss N——, a young lady reporter for one of the daily papers, happened to pass through the hall of the office building in which the justice's court room is situated, in search of "society news." Noticing some commotion about the door of the court room, she asked one of the attorneys in the case if a trial was in progress, when the following colloquy occurred:

Miss N. — "Is the case an interesting one?"

Attorney. — "Yes, very."

Miss N. — "What kind of a case is it?"

Attorney. — "An action of forcible entry and detainer."

Miss N. (throwing up her hands deprecatingly). — "When did it happen?"

HAS HELL LOST ITS TERRORS? — A striking sign of the times is to be found in the editorial comments of various leading newspapers on the test by which it was decided whether Willie Whitla, the kidnapped boy of recent fame, was competent to testify as a witness. Being asked by the judge if he understood where little boys went who told lies, he promptly responded "to hell," and was thereby deemed to have established his competency beyond cavil. With one accord the editorial writers have made merry over the incident, some even going so far as to question the accuracy of Willie's information. In view of the fact that the test applied was the one always used in law courts on such occasions, it would seem that the law and the fourth estate have gotten out of step as to certain theological views. In this connection Mr. Greenfield's article on "The

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Theology of the Common Law" which appeared in LAW NOTES for February, 1909, is of timely interest.

A COMPETITION. — A correspondent calls our attention, with the query, "Can you beat this?" to the following sentence from Judge Gaynor's opinion in Stokes *v.* Stokes, 128 N. Y. App. Div. 849: "But of course the remark of the learned trial judge was inadvertent, and apparently grew out of the omission of the learned counsel for the plaintiff to fulfil his office by carefully reading or explaining the law of the case to the court as laid down in the statute." In response to our correspondent's challenge we would put forward, though with some diffidence, the following language used by the court in Baker *v.* Guinn, 4 Tex. Civ. App. 539, with reference to an instruction by the trial judge that a certain mortgage was the test of jurisdiction: "The mortgage had no more relevancy to the case than the 'white-backed, brindle bull' described in it; and it would have been just as appropriate for the court to have instructed the jury that the value of the courthouse of Guadalupe county was the test of jurisdiction, as it was to give the instruction it did."

PLAINTIFF'S RIGHT TO LAUGH AT JUROR'S JOKE. — The Kansas City Court of Appeals, in the case of McGraw *v.* O'Neil, 123 Mo. App. 691, decided that the conduct of the plaintiff in laughing loudly at a feeble quip of one of the jurors, while reprehensible, did not constitute a ground for a new trial. In the words of the court: "It chanced that the judge was late in returning from luncheon, and as he entered the court room the juror remarked to a fellow member that 'the judge must have had fish for dinner.' Plaintiff laughed at this insipidity as one who laughs at a mirth-provoking jest. The incident did not escape the watchful notice of defendant's counsel, and their indignation, excited by what appears to them to be a wilful disregard of the admonition of the court, was not lessened when they learned the cause of plaintiff's ebullient display and realized the subtle and insidious nature of the flattery contained in such a pleasing demonstration over the repetition of a stale joke." The court apparently reached the conclusion that the plaintiff's conduct arose from weakness of intellect rather than corrupt intent.

Correspondence.

DR. HANNIS TAYLOR'S SIDE OF IT.

To the Editor of LAW NOTES.

SIR: You would hardly have aided and abetted Dr. Goudy's malicious assault upon my "Science of Jurisprudence," by the comments contained in your April number if you had been aware of the unlawful and unprecedented expedients to which he has resorted in his mad effort to defame me. After I had crushed his original assault made in the *Juridical Review*, he attempted to recover himself by a fresh assault in the *London Times* of the 17th of March. In that article he said he would illustrate to all who had not seen his original attack just the kind of plagiarism of which I was capable. He therefore took, as an object lesson, certain matter from Pollock and Maitland's "History of English Law" which he said I had appropriated without credit. He exhibited, in what you call "the deadly parallel" columns, the matter from the two works so that no mistake could be made. There was no pretense that the identical language was used; the charge was that I had used the matter without credit. In order to make his demonstration it became necessary for him to furnish to the *London Times*, over his own signature, what purported to be a copy of an extract from my book, false in three vital particulars. In the first place, he had to remove from the face of my text, after the word "preserved," the figure 3, and with it the corresponding note: "3. See Maitland, Domesday Book, 8." In that work the matter in question, the product of Mr. Maitland, originated. So to the original source from which it came I made my first reference. The matter was then restated and amplified in Pollock and Maitland's "History of English Law," 2d ed., i, 80–87.

The second particular in which the copy given to the *Times*

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by Dr. Goudy for publication is false is this: Instead of printing at the head of the extract "H. T., p. 265," it should have been printed "H. T., pp. 265–266," as the extract ends on page 266. The motive of that suppression is manifest. At the foot of page 266 occurs my second citation as to the matter in question: "See Pollock and Maitland's 'History of English Law,' 2d ed., i, 80–87."

Thus you see that I carefully cited, first, the original work in which the matter in question originated; second, the work in which it was reproduced and amplified. In the false copy given by Dr. Goudy to the *Times*, both citations were suppressed and the figure 3 actually removed by him from my text. He then made it appear that the printed extract did not extend to page 266, at the foot of which the second citation appears.

No argumentation is necessary to prove this stupid and ghastly attempt to defame. Any schoolboy can understand it at a glance if he will open my book at pp. 265–266 and contrast those printed pages with the false copy of the extract as published in the *Times*. What action the University of Oxford will take as to one who has thus published a false copy of a printed record, with the intent to defame, remains to be seen. Perhaps I should be content with the fact that at almost the very moment when my assailant was thus destroying himself, the Institute of France, *en séance publique*, was honoring my book with Rodolphe Dareste, one of the oldest members of the Institute and one of the most famous jurists of France, as the spokesman.

From the foregoing you will perceive that it is not necessary for me to say a word in order to convict Dr. Goudy. You have only to compare the false copy of the extract, republished by you from the London *Times*, over his signature, with my printed pages 265–266. It thus appears from the printed record, (1) that he removed the figure 3 from the face of my text, and with it note 3 at the foot of the page; (2) that he falsely represented the extract as appearing on p. 265, when, in fact, it is on pp. 265–266; (3) that he deliberately suppressed the note at the foot of p. 266: "See Pollock and Maitland 'History of English Law,' 2d ed., i, 80–87." These three acts are affirmative acts, and part of a deliberate design. The moment the suppressed notes appear, the falsity of his charge is fixed. His charge is that I used the matter in question without citations, and then he suppresses the double citations. When, in his first article, he censured the Universities of Edinburgh and Dublin for giving me their honors, after declaring that he had not read a single one of the books on account of which those honors were bestowed, I raised the question as to whether or no his mind is normal. This last performance makes that inquiry still more serious. Please understand one thing clearly. Not even Dr. Goudy has charged plagiarism in connection with my discovery as to the fusion now going on between Roman and English law. His only contention is that there has been plagiarism as to the commonplace details of the subject. He says that authorities often cited should have been cited oftener still.

The only trouble is that, after thirty years of special study, I have made what has been called "an entirely new contribution to legal and political science," which has been most generously applauded in France and Germany. That was a little too much for a small coterie at Oxford that despises everything American, doubly so, after the work of an American had been generously approved on the Continent. I regret to see that those of my fellow citizens who enjoy the abuse that has been heaped upon me, by one who has gone to the verge of forgery, outnumber those who rejoice at the honors bestowed upon me in France and Germany. The finding out of new things is a perilous business.

HANNIS TAYLOR.

WASHINGTON, D. C.

ONE READER PLEASED.

To the Editor of LAW NOTES.

SIR: I observe with extreme gratification the following closing paragraph in "*To Kill or Not to Kill,*" page 24 of May number: "But although such bills [abolishing the death penalty] be defeated this year and next year, and even the year after that, it seems to us a foregone conclusion that before the lapse of many years more the gallows and other like instrumentalities for the violent elimination of our unfit will come to be regarded with no more favor than the thumb screw and the rack."

Such a sentiment from the editorial department of the best law journal I know of is cumulative evidence of the progressive character of LAW NOTES, and if you can as heartily condemn the attempted revival of the Spanish Inquisition under the name of *the third degree*, you will be doing the cause of humanity a notable service.

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The New York Judges and the Law's Delays.

THE scoffer will say that it was rather in keeping with the dilatory legal procedure of the times that the proposed meeting of the ninety-seven Supreme Court justices in the State of New York should have been postponed until some future day; that it was hardly to be expected that the case of the "Law's Delays" would be brought to trial at the first term for which it was noted. We are assured, however, that this proposed meeting will certainly take place some time. That is to be expected, as it is to be expected that most actions will eventually reach trial of the money and patience of the respective litigants are both ample. That there are innumerable delays in law suits which in the end may, and often do, amount to years, cannot be disputed. To read some reported cases is almost like reading a treatise on ancient history wherein fifty years are dismissed with a paragraph and a few centuries accounted for in a chapter. Many specific causes for legal delays have been from time to time pointed out and specific remedies have been suggested, and occasionally have been applied. We trust, however, that few can justly claim that the law's delays are induced by a mercenary motive on the part of the attorneys, yet in some cases this is undoubtedly true. One of the classic stories of the law relates how the old practitioner severely rebuked his son for closing an estate within a short time after entering his father's office: "My boy, I am sorely grieved at your ignorance of practice. Three generations of lawyers have been living on the fees from that estate." We believe that the general cause of the unjustifiable, annoying and useless delays in legal procedure is to be found in the failure to run courts of justice on business principles. Where any reforms have been effected in legal procedure they have been brought about by extending to the proceedings in the law courts the business methods that have been successfully employed in the commercial world. The man who conducts his business in a dilatory, lazy, to-morrow-is-coming manner goes into bankruptcy. Unfortunately for the public the courts have no such means of cleaning the slate. Let the courts be run in a business-like manner and we will have less cause to complain of the law's delays.

The Chicago Bar Primary.

ABOUT ninety per cent. of the members of the Chicago Bar Association voted in a primary held by the association to pass upon the qualifications of the candidates for the Circuit bench. The primary seems to have been conducted on wholly nonpartisan lines and free from objectionable electioneering. Presumably the purpose of the proceeding was to give the voters generally the benefit of the professional estimate of the several candidates, with the hope that popular opinion would be inclined to accept this valuable instruction in the spirit in which it was offered. The inevitable outcry arose, however, that the association was arrogating to itself the functions and privileges of the electorate at large. The union workingmen, through their federation, squarely opposed the views of the lawyers, in the main, for no other reason than that they were the views of lawyers. Popular confidence in the wisdom of the bar's choice of candidates was not strong enough to overcome party ties and personal preferences, and its ticket was, for the most part, defeated.

The Sherman Act.

THE Sherman Act has been again the subject of attack. This time it is Mr. William B. Hornblower of the New York bar who finds it unsatisfactory. And the occasion for letting the lawyers know what he thinks of it came when he addressed the members of the New Hampshire Bar Association at their recent meeting. From his viewpoint its greatest practical defect is the coupling of the penal provisions with the provisions affecting the legality of contract and with the provisions authorizing process of injunction to restrain its enforcement. He well says: "A contract may be against public policy or against the policy of the statute, so that a court may properly refuse to enforce it, or may properly restrain action under it by the parties, and yet such contract may not involve any such element of moral turpitude as to authorize or justify punishment of the parties as common criminals." Mr. Hornblower is, however, ready to admit that moral turpitude frequently exists in the creation or in the conduct of combinations in restraint of trade, and that such moral turpitude should be made a criminal offense. But his position is that the offense should be clearly defined in advance, and that the acts which constitute the offense should be clearly pointed out. Naturally Mr. Hornblower objects to the feature of the Sherman Act which makes every agreement in restraint of trade illegal, whether reasonable or unreasonable. Indeed it seems hard to find very many supporters of that provision to-day. He rightly says that "civilization means co-operation. Co-operation means combination. Combination means restraint of trade."

An Unenforceable Statute.

IF one is particularly interested in the Sherman Act he would do well to read an article by Mr. J. H. Benton, of Boston, in the March number of the *Yale Law Journal*, entitled "The Sherman or Anti-Trust Act." Mr. Benton is the senior counsel of the New York, New Haven and Hartford Railroad, and this fact may incline one to give the article less weight than it would be given if it were not written by an attorney closely allied to a corporation which has had reason to dislike the act. Nevertheless it will bear close reading. One will find there references to all suits in equity brought under the act by the Attorney-General up to January 1, 1909. Mr. Benton pays particular attention to the enforcement of the Sherman Act by suits in equity, which is, as he says, "confided to the sound discretion of the Executive Department, and specifically by the act itself to the discretion of the Attorney-General." He charges that an examination of the suits brought by the different Attorneys-General shows that they have not enforced the act uniformly even as against the large combinations in restraint of interstate commerce, popularly known as "Trusts." He does not think, however, that they have not intended to act fairly and justly, but says that "the magnitude of the task imposed upon them has practically compelled them to discriminate in the discharge of their duty, and this has laid them open to the charge that they have discriminated unfairly and from improper motives." As to the "magnitude of the task," Mr. Benton says that Representative Washburn of Massachusetts, a business man of large experience, estimates that in Massachusetts alone, upwards of five thousand business corporations are engaged in interstate business, many of which are very likely members of combinations in violation of the Sherman Act. Mr. Benton in conclusion says: "The fact is that the reason why the Sherman Act has not been efficiently enforced is because it is an unenforceable statute. It is as useless to attempt to enforce it generally and uniformly, according to its plain provisions, as it would be to attempt to enforce a statute regulating the price of commodities or the intrinsic value of money. The act is an attempt to control commercial and economic forces by statute, and, like all similar acts, must ultimately either fall into entire disuse, or be repealed, after having caused, as such statutes always do, more or less injury to the community. The remedy for the evils of the act is not in providing cumbrous, mischievous, and unworkable methods for avoiding some of them, but by substituting for it, so far as the public welfare requires, a properly framed, guarded, and workable act, with proper provisions for its efficient and uniform enforcement." In view of the fact that the Senate Judiciary Committee has, according to Mr. Benton, recently declared that the Sherman Act is "in every respect a model law," it would seem that his proposition to substitute for it a "properly framed, guarded, and workable act" will not meet with much favor in that quarter, and that for a time, at least, we must continue to worry along under a law about which there seems to be a wide difference of opinion.

THE use of cases is to establish principles; if the cases decide different from the principles, I must follow the principles, not the decisions. Lord Kenyon, *Duke of Leeds* v. *New Radnor*, (1788) 2 Brown's Rep. (by Belt) 339.

A Judicial Faux Pas.

JUSTICE DUGRO of the New York bench has been unfortunate enough to become the target of a series of those editorial fulminations which mark the opening of the silly season and a momentary lack of graver topics. As far as it is possible to disentangle the facts from the mass of words with which our contemporaries of the daily press have encumbered them, as is their wont in dealing with legal questions, it seems that a negro employed as a porter on a Pullman car was arrested on the complaint of a passenger charging him with the theft of a purse containing money. At the trial the court dismissed the charge. Thereafter the porter brought suit in New York against the passenger for false imprisonment and was given a verdict for $2,500. This amount was, in Justice Dugro's opinion, excessive, and he ruled that he would grant a new trial unless the plaintiff consented to a verdict of $300.

In making this ruling the justice is quoted as saying: "The fact that he is a colored man is to be considered. You cannot say he is just the same as a white man when you come to say how much shame he will suffer. He might suffer none. I think if you were to take the mayor of the city and arrest him he would feel very much more humiliated than this porter. In one sense a colored man is just as good as a white man, for the law says he is; but he has not the same amount of injury under all circumstances that a white man would have. Maybe in a colored community down South, where white men were held in great disfavor, he might be more injured, but, after all, that is not this sort of a community."

According to another authority, the court further said: "He was a porter, and while he is just as good as the President of the United States, and if he is imprisoned wrongfully he should be paid for it, it would be bad argument to say he is just as good in many senses. He would not be hurt just as much if put into prison as every other man would be. If he is a colored man, the fact that he is a colored man is to be considered. You cannot say he is just the same as a white man when you come to say how much shame he will suffer. He might suffer more. But, after all, what are the probabilities about it? Is it likely that when a colored man is arrested and imprisoned he feels just as much shame as a white man of any circumstances might? In one sense a colored man is just as good as a white man, for the law says he is; but he has not the same amount of injury under all circumstances that the white man would have."

The Appellate Division upheld the views of the lower court as to the verdict, though without indicating, so far as is known, any approval of his excursion into the field of sociology. If the press reports are correct, these obiter statements were, to say the least, somewhat wanting in tact. They touched not delicately and perhaps unnecessarily on a very vital problem of our national life.

"I WISH that objections to questions as leading might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry. If questions are asked, to which the answer 'Yes' or 'No' would be conclusive, they would certainly be objectionable, but in general no objections are more frivolous than those which are made to questions as leading ones." Lord Ellenborough, *Nicholls* v. *Dowding* and another, (1815) 1 Stark. 81.

Judicial Notice of Sociological Facts.

IT is, perhaps, not one of the smallest of the difficulties that arise in a jurist's career to determine how far he should take judicial notice of extrajudicial conditions. These phases of civic and private life are so constant in their occurrence and so varying in their form that the judge must needs have a broad statecraft and diplomacy to avoid running counter to popular feeling without at the same time shirking his duty. And the man must cauterize his prejudices with the neutrality which is demanded of the judge. Now so far as these reported utterances of Justice Dugro are concerned, they seem to be merely a particular application in informal language of the principle that the extent of the damage to feelings by way of humiliation and disgrace is dependent upon the party's condition in life. And it will probably be admitted that a bishop falsely imprisoned would feel a greater reaction than a bartender. Justice Dugro certainly did not intend to measure the damages in the case in question by the color of the plaintiff. The courts are not so far abreast of the advanced psychology that they can determine the sensitiveness of the litigant by spectroscopic analysis.

A New Kind of Monopoly.

A RECENT decision of the Minnesota Supreme Court, while eagerly hailed in some quarters as asserting a novel principle of law, seems to be little more than a new application of the old maxim, *sic utere tuo ut alienum non lædas*. The facts of the case are that a wealthy banker, having gotten into a controversy with the village barber, established a rival shop, employing a barber to carry on the business, and using his personal influence as well as bargain prices, to attract customers. He succeeded so well that the village tonsor had a vision of impending ruin and brought suit against the banker alleging that the rival establishment was set up, not for the purpose of serving any legitimate interest of its proprietor but for the sole purpose of maliciously injuring the plaintiff by monopolizing the barber trade. The Supreme Court held that "to divert to one's self the customers of a business rival by the offer of goods at lower prices is, in general, justifiable as fair competition, but when a man starts an opposition business, not for the sake of profit but for the sole purpose of driving a competitor out of business with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and liable for damages in an action of tort." The case is an interesting one, perhaps, but after all it is not of great importance in its result on the progress of jurisprudence as a science. It does not, as it would seem to do at first blush, afford a new panacea for the monopolistic disease. Monopolies may drive their competitors out of business but never with the idea of retiring themselves after that result has been accomplished. And it seems that that very element of the case largely influenced the Minnesota court in pronouncing its judgment. The case does furnish, however, a valuable idea to certain classes of reformers whose aim is to abolish some particular existing institution. Take the prohibitionists or local option advocates, for example. Instead of spending vast sums in a campaign of education for the voters, why could they not set up a rumshop of their own, centrally located and unusually attractive, having competent barkeepers and waiters, and making the price of drinks so low as to draw all the trade of the town to the new saloon? Then, when all the other liquor sellers have been driven out of business, let the temperance proprietors quietly close their doors. Perhaps this would prove to be a very effective method of dealing with the liquor evil, and it does not necessarily follow that the courts of other jurisdictions would agree with the Minnesota court in holding such a scheme to be illegal and its sponsors liable in damages.

Judge McClain's Extra Work and Pay.

JUDGE EMLIN MCCLAIN of the Supreme Court of Iowa has lately been put upon the defensive in respect to certain fees and compensation received by him in addition to his official salary. A few years ago the Iowa legislature raised the salaries of the Supreme Court judges from $4,000 to $6,000 per year, and added the proviso that "no member of the Supreme Court shall be paid any compensation for services other than the salary herein provided." The charge is now made that Judge McClain has been receiving extra pay for services rendered both to the State and to private parties. LAW NOTES holds no brief for Judge McClain, but it has not failed to note in the past that such charges as are made against this judge have been generally malicious, often fruitless, and almost always unjust. The present case discloses no exception to this rule. Malice seems to be present, for nowhere does it appear in the newspapers which seem to be at the bottom of the charges that Judge McClain has in the smallest particular neglected his judicial duties. The fruitlessness of the accusation is manifest from the fact that Judge McClain, while condescending to defend himself, which is to be regretted, does not promise to "go and sin no more," which is to be commended. We are left then with the question, Are the charges unjust? With regard to those particular services which have been rendered for private persons, the complaint is absurd. As well might a judge be condemned for writing a novel in his own time, or for selling in market lettuce and cucumbers grown in his private garden. Nothing more need be said on this point. But it is claimed that Judge McClain received large sums from the State for annotating the code supplements, and thereby violated the statute above quoted. Among those versed in the law, statutes of this kind have acquired a well-settled meaning. The interpretation generally placed upon them is that the public officers to whom they relate shall not receive any extra compensation on account of work performed by virtue of and along the direct line of their official positions. That is, a judge to whom such a statute applies can receive nothing outside his salary for acting as a judge. The Iowa statute certainly does not mean, and was not intended to mean, that the judges of the Supreme Court must devote every minute of their time to their judicial duties, irrespective of whether the court has any business to transact or not. Of course it would be morally improper for any judge to neglect his official business in order to transact other business for profit. But, as has been already observed, no such claim is made against Judge McClain. It therefore seems that the charges made must be characterized as unjust and as owing their origin to ignorance as well as to malice. It may be added that precedents for Judge McClain's course

of conduct are not wanting. A case very much in point is *Cornell* v. *Irvine,* 56 Neb. 657, wherein it was held that a commissioner of the Supreme Court of Nebraska, who held office under a statute prescribing his duties, fixing his salary, and forbidding his engaging in the practice of law during his term of office, was entitled to compensation from the State for lectures delivered by him to a law class of the State University, since such extra services are not incompatible with, or included within, the scope of his duties as such commissioner.

The Practice of Professions by Corporations.

GOVERNOR HUGHES has signed the two bills passed at the last session of the New York legislature which aim to abolish what are known as law corporations. One of these bills, now become a statute, provides that no corporation "shall be organized or created for the purpose of conducting any branch of the practice of law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers, or perform legal services of any kind or description, either directly for the person, persons or corporation for whose use such services are rendered or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation." There is plenty of room for a difference of opinion as to the expediency of such statutes, and a great deal has been said and can still be said on both sides of the question; but the better plan is to reserve final opinion on the subject until the workings of the laws shall have demonstrated them to be salutary or otherwise. It may be interesting, however, to note what the courts have said heretofore on the right of corporations to practice professions or trades for which licenses are required, in the absence of express prohibitory statutes. There are not many decisions in point, and none at all so far as the practice of law is concerned. Several cases are to be found, however, dealing with the rights of a corporation in relation to the practice of medicine. In Nebraska it has been held that while a corporation, because of its impersonal character, cannot obtain a statutory license to practice medicine, nevertheless qualified and licensed physicians may form a corporation and make contracts for the services of its members and other licensed physicians, and the making of such contracts is not a violation of the statute forbidding the practice of medicine without a license. *State Electro-Medical Institute* v. *State,* 74 Neb. 40, 12 Ann. Cas. 673. It has also been held in the same jurisdiction that such a contract as the one above referred to is not void as against public policy, since there is no law preventing a person from being beneficially interested in the practice of medicine because he is not himself a practicing physician. *State Electro-Medical Institute* v. *Platner,* 74 Neb. 23. In New York, a somewhat contrary result has been reached. In a recent case it was held that a corporation having no express legislative authority to practice medicine is a "person" within the statute providing that "any person not a registered physician, who shall advertise to practice medicine, shall be guilty of a misdemeanor," and may be convicted of a violation of the statute. *People* v. *Woodbury Dermatological Institute,* 192 N. Y. 454. There is also a dictum by the New York Court of Appeals to the effect that it is beyond the powers of a corporation to engage in and advertise that it is practicing dentistry. See *Hannon* v. *Siegel-Cooper Co.,* 167 N. Y. 244. Other decisions are, on the one hand, that a corporation may engage in the business of auctioneering under a statute requiring persons engaged in such business to secure a license from the city clerk, although the city clerk cannot be compelled to grant a license to a corporation (*People* v. *Scully,* 23 Misc. (N. Y.) 732); and, on the other hand, that a corporation cannot carry on the business of peddling under a statute requiring peddlers to be licensed, although the corporation may have one of its agents licensed and carry on the business through him (*Crall* v. *Com.,* 103 Va. 855; *Standard Oil Co.* v. *Com.,* 107 Ky. 606). In view of the trend of judicial opinion in New York above noted it is barely possible that the statutes prohibiting corporations from practicing law may not have been necessary.

Exchanging Criminals.

THE occasional release of prisoners on condition that they shall leave the State directs attention not only to the legality but to the wisdom of such a practice. Such banishment, it is true, is in a sense voluntary, being undergone in preference to imprisonment. It differs from the compulsory banishment of a citizen from his country, which has been pronounced by Mr. Justice Brewer in *U. S.* v. *Ju Toy,* 198 U. S. 267, to be a punishment of the severest kind. Banishment from the State as a condition of granting a pardon has, to the extent of declaring a return by the person banished to be a breach of the condition, been enforced by the courts. But banishment by police authorities as a condition of withdrawing the charge against a person accused of crime or by judges as a condition of suspending sentence is undoubtedly illegal. The suspension of sentence under such circumstances is an exercise of the pardoning power, which the courts do not possess. The principle involved is, however, a broader one than the mere want of authority to banish. If banishment were expedient, the want of authority could be easily remedied, and the practice extended so as practically to dispense with prisons and reformatories. The obvious objection to such a course is that, inasmuch as what is advantageous for one State is apt to be advantageous for all the States, the result would be merely an exchange of criminals. Aside from this consideration, banishment which enables a person to reside in all of the States except the one from which he was banished is not likely to serve as a deterrent. The fact is that banishment is not an attempt to deal either with the crime or with the criminal. The chief motive for inducing offenders to leave the State is merely to rid the community of persons who, having criminal propensities, may subsequently prove to be a source of trouble. There is, of course, no analogy between such persons and political offenders. Nor is banishment in the same category with the former practice of transporting criminals to penal colonies such as Australia. Often penal colonies served as reformatories. But the practice of setting criminals adrift in another community does not remove the causes of crime and does not tend to reform the criminals. Even if the tendency to commit crime should be regarded as a disease, persons who are afflicted with such a tendency must be treated by the community whose laws they have

violated. What measures should be adopted for the treatment of criminals is, it is true, a perplexing sociological problem. But banishment is certainly not the solution of that problem.

Again the Outcry against Technical Reversals.

PUBLIC dissatisfaction with the much-discussed reversal on technical grounds, of convictions in criminal cases, is growing more and more acute, if the comments of the lay press may be taken as any indication of the state of public feeling on this subject. The Philadelphia *North American* of recent date contains an account, written in a highly critical vein, of the reversal by the Supreme Court of Missouri of the conviction of one Warner who had been found guilty of bribery on seemingly conclusive evidence and sentenced to two years in prison. The ground of the reversal was that the indictment concluded "against the dignity of state" instead of "against the dignity of *the* state" as required, presumably, by the constitution of Missouri. The effect of this decision, according to the *North American's* correspondent, is that "the unostentatious definite article, after centuries of disregard and snubs, has at last come into its own, and is elevated to be the crownpiece in the arch of justice." Then follows about a column of supposed instances of technical loopholes in the law. In a San Francisco paper the Supreme Court of California is editorially rebuked for reversing the conviction of a woman Le Doux for murder, on the ground that the sheriff whose deputy summoned the jury had been engaged in gathering evidence for the State, and that the sheriff by being so engaged must necessarily have become so prejudiced against the accused that his deputy could not be trusted to summon an impartial jury. Such, according to the editorial, is the basis of the reversal, though the writer says he does not have the full text of the decision before him. He proceeds then to lament the breakdown of criminal justice in the State and advises the public to demand that "an appellate court before considering any technical matter whatever shall first find whether, from the evidence, it appears that the accused committed the crime of which conviction has been secured." He concludes: "Sooner or later the people will get that, but they will have to get it over the heads of criminal lawyers and the appellate courts. The judges of our courts are honest. But they are soaked through and through with legal traditions which attach more value to the forms of law than to the administration of justice."

We have not yet seen the opinion of the court in either of these cases. As to the first the court evidently took the position that the conclusion of the indictment must be in the exact language prescribed by the constitution or statute of the State. Such a decision is not so extraordinary, though judicial opinion would probably differ as to the necessity of reversal on that point. For example, the West Virginia Supreme Court of Appeals once held an indictment fatally defective because it concluded "against the peace and dignity of the state of W. Virginia" instead of "against the peace and dignity of the state of West Virginia," as prescribed by the constitution of that State. To cite such instances may be only aggravating the case against the legal profession and the judges, and furnishing ammunition to the lay critics, who are already rabid with denunciation of the processes of the courts — a thing they little comprehend. But the fact is that many a reversal by an appellate court has about as little relation to the just administration of the criminal laws as reformed spelling has to the size of the annual cotton crop. Such decisions make the appellate courts look like an umpire at a game of ball, in which the object is to catch the trial judge or the pleader napping off first base. Nor do we have to go to the daily press to find lamentations of the presence of quibbles and technicalities in criminal procedure. Frequently the opinions of the judges of the appellate courts give forceful expression to the need of an appellate attitude which will subordinate rules of practice to the ends of justice and refuse to set aside a conviction except in cases of gross and prejudicial error. In this situation it is encouraging to remember that the books are full of appeals in which technical error is found to exist, but in which a reversal is denied because the error is found not to be prejudicial. The problem confronting the courts is, to what extent the rules of evidence and of criminal procedure prescribed for the conduct of trials can be violated without prejudicially affecting the rights of the accused.

The Statutory Remedy.

WITH the view of preventing reversals except on grounds of substantial justice the Missouri house of representatives has passed a bill providing that

> "The appellate courts then may not reverse or remand any judgment rendered in any civil or criminal case on any ground unless the court, after an examination of the entire record, can say that the judgment of the trial court was for the wrong party, and that but for the errors complained of, a different judgment would have been rendered."

This statute is a little more positive in its tone than any that we recall, though a number of States have adopted statutes which declare that a new trial shall not be granted except when the substantial rights of a party require it. Such statutes have been said to be little more than a codification of a previously established rule (*People* v. *Strait*, 154 N. Y. 165), and have generally fallen short of accomplishing the result aimed at. The elusive questions as to when the requirements of justice are satisfied in a trial, and what constitutes prejudicial error, must remain with the appellate courts, statute or no statute; and the training of judges in the practice of the law and the persistency of counsel in fighting their legal battles to the last ditch of technical evasion (and no one will deny that it is the duty of counsel for an appellant to urge every defense or ground of reversal that the law recognizes) too often give to an error of procedure a wholly undue importance. It is an interesting but not surprising fact that the Missouri bill quoted above was opposed by every lawyer on the floor except one. The provision of the bill is very sweeping in its terms, including as it does both criminal and civil cases, and if literally applied leaves an appellate court nothing to do except to review the record of the evidence. And then it is natural that lawyers should object to being disarmed all at once of so many of the weapons with which they are accustomed to wage the contests of their clients, and we have a suspicion that lawyers are so closely akin to humanity that they derive fully as much satisfaction from winning an important litigation on what our lay friends would call

a technicality, as on a more meritorious ground. But it is not believed that the bar will stand in the way of genuine law reform.

CRITICISM OF JUDGES RUNNING FOR RE-ELECTION.

SHALL the law permit criticism of a judge's record in office or must he, coming up for re-election, be considered immune from attack on account of work already done upon the bench? This is the question that has been presented to the Supreme Court of Ohio and which on account of its far-reaching importance will probably be passed upon by the United States Supreme Court before it is finally settled. The question has been raised in a disbarment action which has been brought against attorney Charles Thatcher, of Toledo, Ohio, for criticising two judges who were running for re-election during the last campaign. From the newspaper reports of the case it appears that labor organizations during the last judiciary campaign in Ohio published and widely distributed a record of cases involving labor with a list of cases against corporations as determined by the Ohio Supreme Court. Attorney Thatcher used this material with other matter of a similar nature in his campaign against Justices Shauck and Price, who were both candidates for re-election. It is said that on account of the importance of the case all precedents and customs are being ignored, and that for the first time in its history the Supreme Court of Ohio, a court of review, will hear oral testimony from witnesses in a disbarment proceeding. Several of the leading attorneys of Ohio have been retained on either side, among them former United States Senator Foraker.

It has long been settled that a fair and just criticism of candidates for public office is not only justifiable, but highly desirable. Just how it can be claimed that candidates for positions on the judiciary are in any way entitled to exemption from this rule it is hard to understand. When a man consents to be a candidate for a public office conferred by the election of the people he must be considered as putting his character and ability in issue in so far as they in any way have a bearing upon his fitness for the position for which he is seeking the suffrages of the voters, and the publication of the truth on the subject with the honest intention of informing the people would seem to be not only justifiable but laudable. The judiciary, especially in the State courts, being elective, the judges therefore have the same responsibility to the people for the diligent and faithful discharge of all their duties as exists in the legislative and executive departments, and there is the same necessity for public information with regard to the conduct and character of the men who shall be elected to judicial office as there is in respect to the other departments of the government. This idea is admirably emphasized in an opinion delivered by an eminent judge nearly eighty years ago in an action to disbar an attorney for alleged libel on the court. He said: "It is the distinguishing glory of our institutions that a public functionary can claim no immunity, no exemption from public scrutiny and public censure, that does not equally belong to a private citizen. Many things that would be libelous if alleged against a private citizen would not be so if alleged against a public functionary or candidate for political office. In the former case the follies or the vices of a private man do not concern the public and there is no motive to justify their obtrusion into the public print; whereas, in the latter case the public have a deep interest in the free and fearless discussion of the conduct and character of public men. It is a right essential to the enforcement of political responsibility. In this view of the subject there is hardly any latitude of licentiousness which it were not better to indulge in canvassing the conduct of public men than to run the hazard of restricting the liberty of discussion and the freedom of the press under the color of restraining its abuse."

In this country the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith and the moral influence of the courts is gone and popular respect for law is impaired. The one element in government which the American people desire above all things else to keep free from the taint of suspicion is the administration of justice. As was aptly said in *State* v. *Dunham*, 6 Iowa 245, "Respect to courts cannot be compelled. It is the voluntary tribute of the public to worth, virtue, and intelligence, and while they are found on the judgment seat, so long, and no longer, will they retain the public confidence." Alexander Hamilton once said: "When you have divided departments of government and have rendered the system as perfect as it may be, you must give confidence where you place power." But how can such confidence be sustained except by a free and full discussion of the qualifications of those seeking judicial positions? It is conceivable that under a system by which judges are appointed by executive authority and for life terms, as in the case of the United States Supreme Court justice, criticism of judges individually or collectively might be construed into an attack upon the court tending to break down respect for the law. But where the courts are elective and therefore more directly accountable to the people, such a rule would not seem to be applicable. It has been well said that "erroneous judicial opinions, involving great interests should be as open to discussion and criticism as treatises on ethics, religion, or politics. To impute errors to a judicial opinion neither scandalizes those who have pronounced it nor affects their standing or usefulness, unless indeed judges claim an infallibility to which all other men have no pretensions. Commentaries on opinions have useful effects — they may correct errors; but, at all events, they have a tendency to induce greater caution and circumspection." President Taft in his speech before the American Bar Association gave his unqualified approval to the right of the American people to criticise freely and fairly the official acts of judges who were running for re-election, and said that no greater calamity could befall the bar of this country than the denial of the right to criticise freely the acts of judges who were seeking the support of the people. Justice Gaynor, of the Appellate Division of the New York Supreme Court, has recently given public utterance to views along the same line. In a speech delivered at New Rochelle, N. Y., on January 31st last, he said: "I am not one of those who believe that the courts should not be criticised. That is a strange and evil notion. They should be watched and criticised the same as the other branches of government, and can be kept up to a proper standard in no other way. The ludicrous thing is for judges themselves to proclaim that the courts should not be criticised. There has been an epidemic of such non-

sense of late. These same judges, so delicate about criticism and yet indelicate enough to claim that they should be free from it, are probably sadly in need of public attention and criticism."

There do not seem to be any decided cases on all fours with the Thatcher case, but there are many analogous cases upholding the right of the public to criticise candidates for public office. As a general rule such points are raised in actions for libel or slander, although occasionally brought up in contempt or disbarment proceedings. A decision recently handed down by Justice Phillips of the Ohio Common Pleas Court and probably not yet reported is of peculiar interest at this time. It appears that libel suits were brought by two Cleveland attorneys against a newspaper for alleged libelous matter appearing in an editorial article while the attorneys were seeking the nomination for judges of the Common Pleas Court. The editorial complained of said in part: "Sixteen Republican lawyers have entered their names as candidates. Looking over this list, we are amazed at the nerve, not to say impudence, of a majority of the sixteen. Among them are mere youths, police court and justice court lawyers, and others who by no possible stretch of the imagination could be classed higher than third-raters. The Lord knows that the bench of Cuyahoga county is now carrying about as big a burden of incompetency as it can stand, if it is to retain in even the slightest degree the confidence and respect of the community." In this decision, as reported in the daily press, Judge Phillips very forcibly and clearly stated the law on this point. In part he said: "To say of any one who is a candidate for judge that he is unfit to be a judge is not defamatory. I find the law to be well settled that a publication which is a fair comment and criticism on a matter of public interest is not libelous. To say of candidates for such office that they are wanting in experience and that their experience has not been of a kind to qualify them; to say of them that they ought not to receive the slightest consideration at the hands of Republican voters; that at best they are only third-raters, whatever that may mean, and that as judges they would not come up to the high ideal that is symbolized by the blind goddess, whatever that may mean, is certainly not going beyond fair criticism." In *Cuyler* v. *Atlantic, etc., R. Co.,* 131 Fed. 95, the court said: "If judges charged with the administration of the law are not to be criticised on account of their official conduct, the liberty of the press is abridged, and the rights of individuals imperiled. While all citizens should entertain due respect for the courts of the land, it does not follow that editors and public speakers are to refrain from legitimate criticism of the acts of any tribunal. Such criticism should be invited by public officials, in order that the people may fully understand what is being done by those who are acting as their agents in the administration of the law. Public questions are generally settled in the right way, and the fact that such is the case is due in a large measure to their free and untrammeled discussion by the press of the country. The courts are constituted for the purpose of protecting the rights and liberties of the individual, and the enactment of any law which gives a judge the power to prevent the free and unrestrained discussion of questions which may come before the court for adjudication would in many instances defeat the very object for which the courts were established."

As applying especially to the right of members of the bar to criticise the acts of judges the words of Chief Justice Sharswood, whose book on Legal Ethics is known to every lawyer, are of especial significance. In *Ex p. Steinman,* 9 W. N. C. (Pa.) 145, he said: "It is . . . the right and duty of a lawyer to bring to the notice of the people, who elect the judges, every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinion as to the capacity, impartiality, or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a court room, or if they do, it is only at intervals as jurors, witnesses, or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system."

This right of criticism is limited, however, by the condition that the critic does so fairly and with an honest purpose and that he observes carefully the line "where defamation commences and true criticism ends." There must be some foundation in fact for the charges made and the critic must use judgment and moderation. There is a broad distinction between fair and legitimate discussion in regard to the conduct of candidates for public office and the imputation of corrupt motives by which such conduct may be supposed to be governed. If a person goes out of his way to malign the personal character of a candidate he does so at his peril. The publication of falsehoods and calumny against candidates for public office is dangerous for the reason that the people are thereby deceived and competent judges may thereby be defeated. In *Seely* v. *Blair,* 1 Wright (Ohio) 358, this point was tersely brought out. The court said: "That the plaintiff was a candidate for office is no excuse for slandering him. We have no right to tell a lie of another, because he is a candidate for office, or if in office; though we may speak the truth of him, we have no right to bear false witness against our neighbor. It would subvert our government to allow the promulgation of falsehood, which would drive from office men who regard character and leave in only those without any." In *Post Pub. Co.* v. *Hallam,* 59 Fed. 530, Taft, J., used these words: "We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and of course it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold."

The law compels the critic to be accurate in stating the facts which are the basis of his criticism. There are some cases holding that an honest belief in the truth of

the statements made, if made without malice, is a defense, but it is doubted if this rule is supported by the weight of authority. In *Dauphiny* v. *Buhne,* 96 Pac. 880, an action was brought for libel for publishing of the plaintiff, who was a candidate for re-election as alderman, statements in effect charging him with corrupt action in the matter of granting franchises, and an attempt was made to set up as a defense that there was no malice and that the article was published with good motives and with a desire to promote the public welfare. In the course of its opinion the court said: "While the privilege of electors to comment and criticise the acts and conduct of candidates for public places is very large, this privilege must be confined to statements of the truth. There is no privilege of publication under the code or general law which will exempt one from responsibility for falsehood. The only justification one can make who publishes criminal accusations against a candidate is, when he is called to account, to prove the truth of the accusation. Libel is no more justifiable when published about a candidate for public office than if published of him on any other occasion. . . . It is true that when a person becomes a candidate for public office his talents and qualifications for the office to which he aspires may be freely commented on and criticised by any member of the community by publication or otherwise. His faults or his vices, in so far as they may affect his official character, may be freely discussed. He does not, however, by becoming a candidate surrender his private character as a subject for false accusation. . . . The public have an interest in knowing the truth about those who occupy or seek public office, but it has no interest in having falsehoods concerning them disseminated. Hence publication of the truth, with an honest intention of giving information to the public of a candidate, furnishes no ground of complaint."

As noted above the writer has been unable to find any case wherein the question raised in the Thatcher case was squarely presented. But by analogy the rule would seem to be the same with reference to judges as to any other candidate for public office. It seems hardly possible that any valid reason can be given why a judge should be exempt from fair and honest criticism any more than any other candidate. As was said recently in an editorial in the Cleveland *Plaindealer,* "It would mean the establishment of an unfortunate precedent in American governmental affairs were it to become a rule of law that a judge is above criticism, particularly when the judge goes before the public and asks a renewal of the contract under which he represents its interest." Once admit the rule that the decisions of the judges are to be received without comment and without criticism, and we sound the death knell to American liberty. Such a rule savors too much of the old adage that "the king can do no harm," and should find no sympathy in a government based upon the unfettered will of a free people. It is only by bringing government officials to a full knowledge of their accountability to the people who place them in office that the best service can be expected. This applies as well to judicial as to executive officers. It is a principle to which there is no exception "that the highest perfection in all departments of life is only attainable where the results are subject to the criticism and suggestion of those for whom the work is performed."

F. E. ROSBROOK.

ORAL STATEMENTS MISUNDERSTOOD, MISRECOLLECTED, OR MISINTERPRETED.

An attempt to catalogue all the possible causes of error in the transmission of spoken words would be as hopeless as the task of describing exactly and illustrating exhaustively what Professor Minto terms the mythopœic faculty of man. We shall suggest and illustrate only a few of the mistakes that may occur in testimony to oral statements or in construing language correctly reported.

Words are harder to observe than visible things, and one's attention is apt to be more listless than in the presence of actual events. But it frequently happens that a witness did not see all that was actually done or notice all the sounds that were actually audible, and therefore errs in describing physical facts. Imperfections even more insidious are likely to arise from a similar cause when a witness attempts to reproduce oral utterances. Two classical illustrations appear in the books. A man quotes the first sentence of Psalms xiv. 1, and a careless hearer says the speaker expressed his personal opinion that "there is no God." Convivial young men were drinking healths, and one of them was cited before the Star Chamber for having drunk "confusion to the Archbishop of Canterbury." "Tush! You drank to the confusion of the Archbishop of Canterbury's enemies," said the Earl of Dorset, tutoring the young man for his examination, "and the fellow [the waiter witness] was gone before you pronounced the last word." In *Davidson* v. *Lewis,* 7 Fed. Cas. No. 3,606 (at p. 36), a patent infringement suit, it made a difference whether the alleged inventor said, on one occasion, that he "did not succeed," or whether he said "did not succeed as he wished."

The change of an emphasis may make the report of what was said convey a meaning different from what the speaker intended. Thus, if a testator said, "He is a brother," when speaking of a suggested object of his bounty, it might have indicated one thing, had emphasis, apparently coming from deep feeling, been laid in pronunciation upon "is," and quite another had it been scornfully thrown upon "brother." *Appeal of Spencer,* 77 Conn. 638, 60 Atl. 289, *per* Chief Justice Baldwin.

A witness's mistake in a pronoun or a particle may be a stupendous error. A very material difference in the sense of an alleged admission of a defendant prosecuted as a receiver of stolen property was made when the witness testified at first that the defendant used the word "they," and later in his examination said the word was "we." *U. S.* v. *Montgomery,* 3 Sawy. (U. S.) 544, 26 Fed. Cas. No. 15,800 (at p. 1299). "*The* tri-color flag" said to have been unfurled in a meeting of agitators may describe the standard of revolution and anarchy in France, and thus constitute a fundamental variance from "*a* tri-color flag" consisting of other colors that are symbols of loyalty. See Sergeant Copley's speech in defense of James Watson, 32 How. St. Tr. 530. Manifestly, a judge's instruction to a jury that a certain piece of evidence was to be considered *in* determining the value of property involved in the case would be grievously misquoted in assignment of error specifying an instruction that the evidence was to be considered *as* determining the value. See *Dupree* v. *Home Ins. Co.,* 93 N. Car. 237, 241.

If a speaker mumbles a single letter it is possible that the real import of his statement will be radically altered

in the apprehension of a listener, especially if the latter has a slight bias in his mind at the time. Thus, a testator's declaration "I had a will" would be essentially different from "I have" a will; the one signifying the existence of the will, the other its being no longer in existence. *Colvin* v. *Fraser,* 4 Eng. Ecc. 113, 150.

Words that are phonetically similar are readily mistaken one for another. In *Pohle* v. *Second Ave. R. Co.,* 13 N. Y. App. Div. 393, 42 N. Y. Supp. 1092, a statement by the plaintiff, which was written from his dictation, made him say that he was a silk manufacturer, whereas he was a sieve manufacturer, and the discrepancy did not at all impeach the integrity of the statement as offered in evidence. In *Williams* v. *Hall,* 1 Curt. Ecc. 597, 611, where a person was charged with saying to another in an angry altercation: "I am come to teach you we are not living in Barbary," etc., there was some discrepancy among the witnesses as to whether "Tartary" was not used instead of "Barbary." But in *Campbell* v. *Campbell,* 22 Grant Ch. 322, 338, 359, a divorce case, Vice-Chancellor Blake, of Ontario, refused to be convinced, even by positive testimony, that the word "navy" was used instead of "navel" in a conversation between unseen speakers heard by eavesdroppers.

Language of a speaker may be reported by a witness with completeness and literal precision and yet fail to sustain the particular interpretation which the witness or counsel or perchance the court attaches to it. In many instances the words uttered were intended to be true only *sub modo.* If James Boswell had said he was "intoxicated" at a social gathering one evening it would be wrong to suppose that he was drunk, for we are expressly informed in one of his published letters that he was "intoxicated, but not drunk." In *Huggins* v. *Drury,* 192 Ill. 528, 61 N. E. 652, Mr. Justice Magruder said: "The testator remarked upon a number of occasions that William was not his son, meaning thereby, as we construe the evidence, that his conduct was so opposed to the ideas of his father as to what his conduct ought to be that he was not a son or boy of such a man as his father. The meaning of the expressions was that he was not worthy to be the testator's son, and not that the testator suspected in any way that his son was a bastard." In another case the court said: "All observation shows that parents habitually speak of property in the possession of their children as their children's, without any intention of disclaiming their own title. Between father and son such language is understood as it should be, but when related before a judicial tribunal it may make a very different impression." *Harris* v. *Richey,* 56 Pa. St. 395, 398, *per* Strong, J. "It is so entirely usual to call certain books, or utensils, or rooms, or houses, by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to their children as against each other, and in subjection to their own paramount right." *Poorman* v. *Kilgore,* 26 Pa. St. 365, quoted in *Geer* v. *Goudy,* 174 Ill. 514, 524.

In common parlance a man may well say, and possibly often does, that "he has made" a will, when he has written a testamentary paper, however incomplete or unfinished that paper may be. *Beaty* v. *Beaty,* 2 Eng. Ecc. 60, 63, *per* Sir John Nicholl. "Many a person who has had a long paper put into his hand may say he has read it, when he may have only glanced over it." *Atter* v. *Atkinson,* 1 P. & I. 665, 669, *per* Sir J. P. Wilde, instructing a jury, and intimating that a testatrix had not read the will which she was about to execute, although she had answered "Yes" to the question "Have you read it?"

There was testimony that a witness in the case of a contest of a will had stated in conversation that he "had been writing a will" for the testator. The witness did write the *testatum* clause, and as the object of his statement was merely to communicate the fact of his participation in the execution of the will, "it is easy to see how he might use that expression," said the court, "without intending to say specifically that he wrote the body of the will, especially as the evidence shows he was a very talkative man, and given to exaggeration in ordinary conversation." *Boylan* v. *Meeker,* 28 N. J. L. 374, 376.

"I heard that you arrested" Mr. So and So, said A to B. "Yes, that is true," replied B. This conversation, the court thought, under all the circumstances, might well have had reference to the action of an official board, for whom B was clerk, and not to the individual action of B. *Miller* v. *Milligan,* 48 Barb. (N. Y.) 30, 39.

An admission attributed to a defendant in a criminal case that if a certain act of his, stating it, became known it would make him guilty, may have been merely an expression of his opinion that it would make him *appear* guilty. Under all the circumstances, testimony to the statement was regarded as "weak and unsatisfactory evidence" against him in *People* v. *Kelly,* 42 N. Y. Supp. 756, 761.

The fact that it is difficult or impossible to surmise what a speaker said if the report of his statement is to be rejected as incorrect is not necessarily a strong argument that the report is trustworthy. For example, a testator ordinarily informs attesting witnesses to his will that the document before them is his *will,* and if honest witnesses testify that he said so, how can it be supposed that they err? Why, he said it was his *whim.* But who would guess it! In the Folio text of Shakespeare's King Henry V., Hostess Quickly is reported as saying that Falstaff's nose was as sharp as a pen, "and a Table of greene fields." Theobald won immortal fame by converting the senseless phrase into "a' babbled of green fields." How many would have thought of that felicitous emendation?

"Testimony as to declarations of a deceased person should undoubtedly be disregarded upon the least conflict with the probabilities of the case." *Per* Surrogate Woodin, in *Matter of Burtis,* 43 N. Y. Misc. 437, 89 N. Y. Supp. 441, 457. "Aside from the danger of fabrication, verbal admissions are regarded as unreliable evidence, because experience shows that they are frequently misunderstood, imperfectly remembered, and inadvertently made." *Per* Vann, J., in *Tousey* v. *Hastings,* 194 N. Y. 79, 86 N. E. 831.

CHARLES C. MOORE.

"THERE are frequently things sworn to which are so improbable that one does not believe them. It is one of the commonest things in the world in a criminal case to have the most positive oral evidence given on oath to establish a matter which neither the jury nor the judge can believe, although it is sworn to." — Lord Blackburn, *Gardner* v. *Gardner,* (1877) L. R. 2 App. Cas. 738.

Observations Here and There.

"TIME-SAVER Co." is a corporate name exhibiting novelty and utility, but some patents owned by that company were invalidated for anticipation in 165 Fed. Rep. 348.

"The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point." *Per* James, L. J., in Panama & S. P. Tel. Co. *v.* India Rubber, etc., Tel. Co., L. R. 10 Ch. 526, quoted *per* Lord Macnaghten, as "the observation of a great judge," in Keighley *v.* Durant, [1901] A. C. 245.

A due recognition of the status of an attorney representing his client in the trial of a cause demands that he be not required by adverse counsel to take the witness stand, unless there be a reasonable necessity for such action. *Per* Prentice, J., in Loomis *v.* Norman Printers' Supply Co., 81 Conn. 343, 350, 71 Atl. 358, 361.

"Striking evidence out after the jury has heard it does not always remedy the mistake in erroneously admitting it, and trial courts cannot be too cautious in avoiding the necessity of so doing, and especially when the law excluding such evidence is well settled." Robinson *v.* Cedar Rapids, 100 Iowa 662, 665.

In State *v.* Rowe, (Iowa) 116 N. W. Rep. 595, a case which covers less than half a page and is "not to be officially reported," the court says 51 errors were assigned and argued, "being subdivided into 204 so-called propositions." The appellant's conviction for the killing of one Chester White pig in a pasture was affirmed.

"The requests to find in favor of a defeated party are made with a view to support a result opposed to the conclusion reached, and it is a difficult task to endeavor to produce harmony by playing two different tunes on the same fiddle at the same time." *Per* Justice McAdam, in Livingston *v.* Manhattan R. Co., 16 N. Y. Supp. 110.

"It is not desirable that decisions should oscillate with changes in the bench, and we accept what was decided as the law," although "it is quite possible at least that if the question came up now for the first time the majority might be found to be on the side which did not prevail." *Per* Holmes, C. J., in Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125.

It seems that all "Chinks" do not look alike on the Pacific coast. Rule 37 of the Circuit Court of Appeals for the Ninth Circuit provides: "Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody, a photograph of the defendant shall be attached to said bond."

A case must be clear and certain in order to sustain a direction of a verdict by the court. "It is easy to move for such direction, and in hurry, excitement, and mass of evidence received at the trial, the justice, relying on his own recollection, must also depend considerably on the statement of counsel as to the facts presented. It is therefore dangerous for counsel to urge a direction, unless the case is clear and unquestionable." *Per* Justice McCarthy, in Marine *v.* Peyser, 6 N. Y. Misc. 540, 27 N. Y. Supp. 226.

The plaintiff in McLaren *v.* Alabama M. R. Co., 100 Ala. 506, declared immediately after he was injured: "I thought I was young and supple enough to board a moving train, but find I am mistaken. I find I am growing old." The court agreed with him. Mr. McLaren should investigate the merits of the scented soap to which Justice Duer was referring when he said, in Fetridge *v.* Wells, 13 How. Pr. (N. Y.) 385: "It would seem that so long as the 'Balm of Thousand Flowers' may be procured, it will be a folly to grow old, and a mistake to die."

"Nothing can be more dangerous than to allow a person to mend his case after it has been brought before the court, when he knows, from the decision of the court, the exact point where the evidence is considered to fail." Basham *v.* Smith, 22 Beav. 195, *per* Sir John Romilly, denying an application to send a case back to the master, after the court had held the evidence to be insufficient on a point whereon it was clear that the applicant could not "mend his recollection" in any way to increase the confidence of the court.

"The most serious blot on the American system of jurisprudence is that whereby a question affecting the rights and liabilities of a citizen may be differently decided by courts of different governments, whose judgments are equally binding and final. . . . A suit against one in a State court may be decided one way, and a suit against the same party in the federal court, involving the very same question, may be decided the other way. As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into that jurisdiction whose rules of decision are believed to be most favorable to his side of the case." Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 70 Fed. Rep. 201, 209, *per* Circuit Judge Caldwell.

When a lawyer writes an attestation clause for a will that he draws, especially if he expects to superintend execution of the will, he should be careful to have the clause recite *all* of the statutory formalities required for valid execution, for the attestation clause does not create a presumption of compliance with a requirement not mentioned in it. But a more serious consequence of an omission is that a presumption of regularity arising from the fact that the will was executed under the supervision of a competent lawyer can hardly be indulged where the attestation clause repels an inference that he was familiar with the statutory formalities. And a still graver result is that his positive testimony on application for probate that everything was done as required by law may be insufficient in probative force to withstand much opposing testimony by laymen. Schofield *v.* Thomas, 236 Ill. 417, 86 N. E. 122.

Newspapers have reported in the last few months many instances where an automobile struck a pedestrian or a vehicle, inflicting serious or fatal personal injuries, and instantly sped onward so that the machine or its driver was not identified. Legislatures can do something to discourage that practice by enacting a statute similar to the Act of Congress of Sept. 4, 1890, c. 875, 2 Fed. Stat. Annot., p. 202, which requires that the master or person in charge of a vessel in collision with another shall, "so far as he can do so without serious danger," etc., "stay by the other vessel," render assistance if needed, "give the name of his vessel and her port of registry," etc., and provides that "if he fails to do so, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default." Even without such a statute, however,

the conduct thus denounced would probably be treated by a judge or jury as a *prima facie* confession of dereliction. But the Act of Congress also imposes "a penalty of one thousand dollars or imprisonment for a term not exceeding two years" for violation of the provisions above quoted.

At the banquet given by the New York Lawyers' Association in honor of the justices of the Appellate Division, First Department, of the New York Supreme Court, March 20, 1909, Mr. Justice Charles H. Truax said in the course of his address: "'Law's Delay' is a misnomer — it is the lawyer's delay. You have no idea of the amount of work done in the courts by the judges. I know a judge who tried in one year 311 equity cases, heard 1,658 motions at Special Term, Part I., and 1,607 at Special Term, Part II., and he is still alive and still working at the old stand. You read of the long and learned opinions of the old courts. Why, Presiding Justice Patterson has written more opinions than any English judge ever wrote in his life. I was curious enough once to go down into the county clerk's office and get the records of the Chancery Court. The chancellor, Robert R. Livingston, was a hard-working man. He tried four cases in four years; and the Appellate Division, in this department, in one year does more work than the Supreme Court of the United States did from the time of its organization down to 1812, and I have counted the cases. Now was it so awfully hard for them to write learned opinions when they didn't have to write but one or two a year? But suppose they had the demnition grind that the justices of the Appellate Division now have, and then suppose they had a sort of stupid bar to help them along!"

In the federal courts and in nearly all of the States, both law and equity are administered by the same body of judges. Perhaps some of the judges are better versed in legal than in equity jurisprudence. It is quite likely, however, that others have superior qualifications as chancellors. At any rate, the opinions of the United States Supreme Court and of the Supreme Judicial Court of Massachusetts, for example, do not reveal, so far as we can detect, any deterioration of ability to handle chancery cases. But the advantage of the application of the principle of division of labor to judicial work was lately asserted with *a priori* and *a posteriori* confidence in a State where the old dual system still obtains: "Day after day our two systems of courts are at work, each within its appropriate sphere. Our judges are trained and become expert in that particular kind of work which is allotted to their respective courts. . . . In New Jersey we believe in the so-called separation of law and equity, because we think that such separation leads to the evolution of better law and better equity, to the training of better law judges and better equity judges than is possible under a system which compels every trial judge to be expert in all branches of judicial work." *Per* Vice-Chancellor Stevenson, in L. Martin Co. *v.* L. Martin & Wilckes Co., (N. J. Ch.) 71 Atl. 409, 416. Certain it is that New Jersey chancellors never evince misgiving — nor have they any reason to do so — in judicial altercation even with the United States Supreme Court. See, for instance, Putnam *v.* Clark, 35 N. J. Eq. 145, approved in Safe Deposit, etc., Co. *v.* Gittings, 102 Md. 456, 5 Ann. Cas. 941, 62 Atl. 1030.

In Schwanenfeldt *v.* Chicago, etc., R. Co., 80 Neb. 790, 115 N. W. 285, the court and jury had the pleasure of listening to an expert whose profession is not often represented on the witness stand. The plaintiff was driving a horse and wagon at a jog trot when he was struck at a crossing by a train that had given no warning. The defendant contended that the plaintiff should, in the exercise of ordinary prudence, after the train came into view, have stopped his horse or jumped from his wagon, in time to avoid the collision. But the evidence showed that his view of the approaching train was so obstructed that he could not possibly see it until he was within seventeen feet of the track, and that he had probably less than one second to act upon the warning given him by the sight of the cars. It is a matter of common knowledge that the time required to respond to such warnings varies in different individuals and under different circumstances. Dr. Bolton, professor of psychology at the University of Nebraska, was sworn as a witness and enlightened the jury as follows: "His evidence showed that by actual measurement from one-eighth to one-half a second is required to respond to an expected warning by those possessing the quickest mental and physical action; that response to an unexpected warning takes much longer; that response to a warning through the eye is slower than when the warning is through the ear; that, if the warning threatens danger, it may produce temporary paralysis of the muscles and delay action; and that the quickest persons only require about one-third of the time to respond to a warning demanded by those of slower perception." This was expert testimony of real value and no doubt it was cordially received. Judgment for the plaintiff was affirmed. A person's eyes may be so dazzled by a locomotive headlight as to disable him from observing the approach of a dark engine (Moore on Facts, § 311); and in Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. 575, Dr. Flagg was permitted to testify how long the eye, after looking upon a dazzling light, requires to adjust itself to its natural power of sight so as to be able to see in a more obscure light.

Cases of Interest.

VALIDITY OF TENDER OF FIVE-DOLLAR BILL IN PAYMENT OF STREER CAR FARE. —In Wynn *v.* Georgia Ry. & Electric Co., 64 S. E. Rep. 278, the Georgia Court of Appeals holds that a rule of a street railway company that conductors shall make change to an amount not exceeding two dollars is reasonable, and that where such a rule exists the tender of a five-dollar bill in payment of a five-cent fare with a request for a return of the change is not a good tender of the fare. The action was for damages for refusing passage on the car to the person tendering the bill, and, as no valid tender of the fare was made, of course a recovery was denied.

DISBARMENT OF ATTORNEY FOR SOLICITING EMPLOYMENT AS DEPRIVATION OF CONSTITUTIONAL RIGHTS. — In State *ex rel.* Mackintosh *v.* Rossman, 101 Pac. Rep. 357, the Washington Supreme Court holds that inasmuch as the right to practice law is not a natural right or a right protected by the Constitution of the United States, but one which may be surrounded by such reasonable restrictions as the legislature may prescribe, the Washington statute making it unlawful for any attorney to solicit, personally or through others, employment to prosecute or defend any suit, and providing that any attorney violating the statute shall forfeit his right to practice law in the State and be disbarred, is a legitimate exercise of legislative power.

TRAINING SCHOOL FOR NURSES AS "SCHOOLHOUSE" WITHIN STATUTE REGULATING PLACE OF SALE OF LIQUORS. — In *In re* Townsend, 88 N. E. Rep. 41, the New York Court of Appeals holds that the statute of that State prohibiting the sale of intoxicating liquors to be drunk on the premises in any building on the same street and within two hundred feet of a building used exclusively as a "schoolhouse" does not include in the

word "schoolhouse" a building used as a training school for nurses at least twenty-three years of age. The question decided is declared to be one of first impression, but reasoning from the purposes to be accomplished by the statute the conclusion is reached that the term "schoolhouse" embraces only public common schools and high schools and semi-public schools of the same grades. Chase, J., dissents.

ADMISSIBILITY OF RADIOGRAPH OF BULLET IN HUMAN BODY. — In State *v.* Matheson, 120 N. W. Rep. 1036, the Iowa Supreme Court holds that in a prosecution for assault by shooting, an X-ray photograph or radiograph taken of the body of the wounded prosecuting witness and purporting to show the bony structure of his body and the location of the bullet is admissible upon testimony by a physician who directed the taking of the radiograph that it is a correct representation of the body of the prosecuting witness at the time it was taken. Although neither the operator of the machine nor the physician could testify that the spot indicated on the radiograph was a bullet, it was held competent for either of them to testify that the spot was such as a bullet imbedded in the body would produce.

CORPORATION AS WITHIN HOMICIDE STATUTE. — In People *v.* Rochester Ry. & L. Co., 88 N. E. 22, the New York Court of Appeals holds that a corporation cannot be guilty of the crime of manslaughter under the New York statute defining homicide as "the killing of one human being by the act, procurement, or omission of another," and providing that a homicide which does not constitute the crime of murder or manslaughter in the first degree shall be manslaughter in the second degree when committed without design to effect death "by the act, procurement, or culpable negligence of any person." It is held that there is no evidence of an intent on the part of the legislature to abandon the limitation of its enactments to human beings and include a corporation, and that although the term "person" sometimes embraces a corporation, such is not the meaning of that term as used in the statute before the court.

LIABILITY OF OWNER OF TELEPHONE FOR INJURIES RECEIVED BY PERSON IN REMOVING WIRE SO AS TO MOVE BUILDING ACROSS HIGHWAY. — In Morris *v.* Rounsaville Bros., 64 S. E. Rep. 473, the Georgia Supreme Court holds that the owner of a telephone line along a public road is not liable to a person who climbs one of the poles by permission of the owner for the purpose of removing the wire so as to permit the moving of a building across the highway and who in climbing such pole falls and is injured by reason of its rotten condition, even though the line was erected "without authority or right, and contrary to law," and the pole was knowingly allowed to stand in a rotten condition. The court points out that an act cannot constitute negligence toward a particular person unless there is a breach of a duty owing to such person at the time and under the circumstances, and decides that there was no duty on the owner of the telephone line to keep the poles in safe condition for persons to climb in order to remove wires thereon so as to move a house across the highway.

IMPORTANT COPYRIGHT SUIT DECIDED. — The case of West Publishing Co. *v.* Edward Thompson Co. for alleged infringement of copyright was decided in favor of the defendant by Judge Chatfield in the United States Circuit Court for the Eastern District of New York on June 1. The suit was commenced on April 13, 1903, and is unique in copyright litigation. The bill alleged that the complainant was the proprietor of about ten thousand separate copyrights on as many pamphlets and bound volumes of law reports and digests obtained during the period from 1873 to 1903, and that all these copyrights had been infringed by the defendant's seventy-four volumes of Encyclopædias of Law published during the years 1887 to 1903. Among the defenses set up by the defendant were fair use, laches, abandonment by the complainant of many of its copyrights, expiration of other copyrights, failure of the complainant to copyright some of its works, and that others were merely reproductions of the works of previous writers. The taking of testimony occupied nearly four years. Judge Chatfield dismissed the complainant's bill on the grounds that the defendant was not guilty of legal infringement and that a very considerable portion of the complainant's publications were not protected by copyright for the reasons stated above.

NEW YORK "SKY SIGN" ORDINANCE HELD INVALID. — In People *ex rel.* M. Wineburg Advertising Co. *v.* Murphy, 88 N. E. Rep. 17, the New York Court of Appeals holds that the section of the Municipal Code of the city of New York defining a sky sign as "any letter, word, model, sign, device, or representation in the nature of an advertisement, announcement, or direction supported or attached, wholly or in part, over or above any wall, building, or structure," and providing that sky signs "shall not be at any point over nine feet above the front wall or cornice of the building or structure to which they are attached or by which they are supported," has no direct relation to the safety or welfare of the public and is invalid. The reason urged for the passage and enforcement of the ordinance was that the sky signs prohibited constituted a public menace because of the danger of their falling into the streets. The court holds that the prohibition is arbitrary and unreasonable because applicable to sky signs in remote parts of the city and erected at a safe distance from any public street, as well as to signs in the congested parts of the city upon the front of a building situated upon the line of a public highway. A more serious objection to the ordinance is declared to be that it prohibits absolutely the "sky sign" as defined in the ordinance, but does not prohibit the structure on which the sign is painted and from which the danger, if any, must arise. This aspect of the ordinance is likened to a provision limiting the height of all buildings in the city which are painted a particular color, but leaving unrestricted the height of all other buildings.

VALIDITY OF STATUTE PROHIBITING ASSIGNMENT OF SALARY. — In Massie *v.* Cessna, 88 N. E. Rep. 152, the Illinois Supreme Court holds that the statute of that State providing that "no assignment of the wages or salary of any person shall be valid" except upon written assignment duly acknowledged before a justice of the peace and served on the person or corporation from which such wages or salary is due or to become due, and that no assignment of wages by a married person shall be valid unless the same is executed and acknowledged before a justice by the assignor's wife or husband, is invalid because in violation of the constitution of the State providing that "no person shall be deprived of life, liberty, or property without due process of law." The argument for the validity of the statute was that it was a wise and necessary exercise of the police power to protect the wage earner from usury and imposition at the hands of persons engaged in loaning money; but the statute not only applies to those working for "wages," properly so called, who may need such protection, but to all salaried persons including the president of a corporation who is in the enjoyment of a salary of twenty thousand a year or more, and it is held that there is nothing in the public policy of the state requiring or warranting the abridgment of the right of persons earning the higher salaries to assign such salaries at pleasure. It is intimated but not decided that such a statute limited strictly to the assignment of wages would be valid. Justices Vickers and Dunn concur specially, disclaiming concurrence with any intimation in the opinion that the statute would be valid if restricted to wages.

STATE REGULATION PROHIBITING CONVEYANCE OF LIQUOR BETWEEN POINTS IN STATE AS AFFECTING INTERSTATE SHIPMENT. — In High *v.* State, 101 Pac. Rep. 115, the Supreme Court of Oklahoma holds that a citizen of the State has the right, under the Constitution of the United States, to receive a shipment of whiskey from another State and after its arrival at the depot in the State to convey the same in the original package to his home as a continuation of the interstate transportation, and that the provision of the constitution of Oklahoma prohibiting the conveyance of intoxicating liquors from one place within the State to another place within the State has no application to the carriage by wagon of an unbroken package of intoxicating liquors from the depot of a carrier to the home of the consignee, and would be invalid as conflicting with the Federal Constitution if the State constitution were construed to have such application. It is also held that the Act of Congress of August 8, 1890, known as the "Wilson Act," providing that intoxicating liquors upon arrival in a State shall be subject to the laws of the State to the same extent as if such liquors had been produced in the State regardless of whether such liquors are introduced into the State in original packages or otherwise, does not give a State authority to declare arbitrarily when an interstate shipment of liquor shall become subject to the laws of the State or to make the shipment subject to such laws while it is still in course of interstate transportation. In Hudson *v.* State, 101 Pac. Rep. 275, and McCord *v.* State, 101 Pac. Rep. 280, the same questions were before the Oklahoma court and were similarly decided.

LIABILITY OF COLLEGE ATHLETIC ASSOCIATION FOR INJURIES RECEIVED IN COLLAPSE OF DEFECTIVE GRAND STAND. — In George *v.* University of Minnesota Athletic Association, 120 N. W. 750, it is held by the Minnesota Supreme Court that the athletic association of the University of Minnesota is a branch or department of the university and cannot be sued in an action of tort brought by a spectator injured by the collapse of a defective grand stand or platform at an intercollegiate football game. The facts were as follows: The board of regents of the university established the university council, composed of the deans of all the faculties, together with one member for each four hundred students or major fraction thereof, and a general representation from the alumni association. The council, as authorized by the regents, appointed "a committee on athletics" composed of five members taken from the different college faculties, and this committee was given supervision of the athletic field and the duty of seeing that the seating arrangements were safe. There was also an "athletic board of controll" composed of seven student members, two faculty members, and two alumni members. The board of control was supervised ultimately by the university council, and by the board of regents. The athletic field, stands, etc., belonged to the university. The athletic association, composed of those members of the student body and faculty who subscribed to its constitution, owned no property, nor could its members participate in any profits of the association, which consisted solely of the gate receipts at athletic exhibitions, and the surplus of which was used for the improvement of the field. The board of control resembled many organizations commonly found in colleges and schools whereby the authorities of the educational institution retain ultimate, absolute control, but enlist the interest, sympathy, and support of the student body by giving to members elected from it representative and limited power. The conclusion was that the athletic association was neither a partnership, corporation, nor a voluntary association of individuals transacting business, and therefore was not a proper party defendant in the suit. Chief Justice Start and Justice Lewis dissented.

SCOPE OF FEDERAL SAFETY APPLIANCE ACT. — The United States Circuit Courts of Appeals have in several recent cases further defined the scope of the Federal Safety Appliance Act of March 2, 1893, as amended by the Act of March 2, 1903, requiring the use of power brakes, automatic couplers, etc., by railroads engaged in interstate commerce. In Wabash R. Co. *v.* United States and Engin, etc., R. Co. *v.* United States (two cases heard together), 168 Fed. Rep. 1, the Circuit Court of Appeals for the Seventh Circuit holds in the first of these cases that the provision of the act requiring "any car used in moving interstate traffic" to be equipped with safety appliances, forbids a carrier to haul or use on its interstate line any car not so equipped that is customarily or generally employed in moving interstate traffic, even though at the particular time the car be empty or be moving intrastate traffic between points situated within the same state, and that as so construed the act is constitutional. In the second case it is held that a car which is set apart for carrying intrastate traffic exclusively but is hauled in connection with interstate cars on an interstate line is required by the act to be equipped with safety appliances. Judge Seaman dissents from the holding in the first case, being of the opinion that a car moved only for the purpose of intrastate traffic is not subject to congressional legislation, and that the act, if interpreted to include such car, is invalid. In Belt Ry. Co. of Chicago *v.* United States, 168 Fed. Rep. 542, the same court holds that a railroad located wholly in Cook county, Illinois, and constituting a belt line intersecting various trunk lines leading into the city of Chicago, and engaged in the business of transporting cars between the industries located along its line and the trunk lines for a fixed charge per car collected monthly from the trunk lines, is engaged in interstate commerce and subject to the penalties of the Safety Appliance Act in moving from the tracks of one trunk line to the tracks of another a car, not equipped with safety appliances, consigned to a point beyond the State. In Chicago, etc., R. Co. *v.* United States, 168 Fed. Rep. 236, the Circuit Court of Appeals for the Eighth Circuit holds that a defective car moved from one State to another only for the purpose of having it repaired and placed in a condition to conform to the Safety Appliance Act is not used in interstate commerce within the prohibition of the act, though an empty car moved for the purpose of receiving interstate traffic would be within the act.

New Books.

NEGLIGENCE IN PARTICULAR PLACES.

The Law of Personal Injuries on Railroads. By Edw. J. White. Two volumes. Vol. I., pp. clxiii + 826. Vol. II., pp. xxviii + 913. St. Louis: F. H. Thomas Law Book Co. $13.00.

There is an old story of a young attorney who went to a law library and inquired anxiously for "a good book on stabbing," explaining that he had a stabbing case to defend and wanted to read up on the law of the subject. We may smile at him, but it is undeniable that to some extent he represents a considerable fraction of the bar, and for him and his confrères authors must write and publishers must print. Hence two volumes which, dealing with the general subject of negligence, or, if you please, with the specific subject of personal injuries, are limited strictly to injuries occurring on railroads. The author of these two volumes, Mr. Edw. J. White, has heretofore produced a work on "Personal Injuries in Mines." One of these days we may have a treatise on Highway Robbery Committed on Street Corners, or an earnest disquisition on Bailments of Gold Watches. Our stabbing specialist will never, if he can help it, get beyond the

particular facts to examine the underlying and fundamental principles — those principles which determine the question of liability for negligence resulting in personal injuries whether exhibited on a railroad, in a barn, or in front of a buzz-saw.

To cover his subject, Mr. White has been obliged, of course, to depart constantly from the specific and enter a little way into discussions of general principles. Comprehended within the scope of the work, and obviously necessary to an understanding of the particular applications, are many statements of law which would be equally applicable to actions for personal injuries anywhere. Thus, there are fragmentary general treatments of the subjects of proximate cause, jurisdiction, parties to actions, instructions to juries, *res ipsa loquitur*, contributory negligence, master and servant, license, trespass, fellow servants. If the author should write another book on personal injuries on steamboats, it is hard to see how he could make his work complete without repeating all this matter.

The first volume of the work is devoted entirely to injuries to employees of railroads, while the second volume takes up injuries to others than employees, to wit, passengers, licensees, and trespassers. One would expect that an entire volume devoted to injuries to employees would include a reasonably full discussion of every phase of that subject; yet so far as a somewhat extended search discloses, the important topic of limitation of liability for future negligence to employees is dismissed with a wholly inadequate treatment concealed in a note to section 243, a bare handful of cases being cited. For example, the statement is made that "contracts releasing a railroad company from all liability for injuries from its negligence are not generally enforced." This is plainly not true as stated. Releases from all liability for past negligence are as good as any other releases. The author doubtless means future negligence, but he does not say so. The case of Peterson *v.* Traction Co., 23 Wash. 615, is cited as *contra*, but the author fails to note the fact that on rehearing, 23 Wash. 643, the point was held not to have properly arisen, and the question was expressly left open. The case of Western, etc., R. Co. *v.* Bishop, 50 Ga. 465, which is really *contra* and is a leading case in support of the minority view upholding contracts limiting the liability of masters to their employees for future negligence, is not cited by Mr. White in this connection, but is used by him in volume 2, section 850, to support the statement that railroad companies may contract for exemption from liability to passengers riding on free transportation — a proposition with which the case has absolutely nothing to do. There are plenty of decisions on the subject, a large majority of the citations in the note to Johnston *v.* Fargo, 6 Am. & Eng. Ann. Cas. 1, on the general subject of the validity and effect of contracts limiting the liability of masters to servants for future negligence, being railroad cases. This note covers nine pages of small type, and would easily have made a good-sized chapter of Mr. White's book. Comparatively few of the decisions show up in Mr. White's table of cases.

The work possesses undoubted value as an industrious compilation of a particular class of cases on the subject of personal injuries, and as such is worth adding to the library of any lawyer engaged in negligence litigation; but it will not supersede prior standard works on negligence and personal injuries.

THE CONSTITUTIONAL LAW OF EMINENT DOMAIN.

The Power of Eminent Domain. By Philip Nichols. Pp. xxi + 560. Boston: Boston Book Co., 1909. $5.00.

This book might have been entitled "Constitutional Limitations of the Power of Eminent Domain," for with fair accuracy its scope may be thus described. Following the present-day tendency in legal writing to select narrow points and treat them thoroughly, the author has not attempted to cover the whole field of even the substantive side of the law of eminent domain, but has contented himself with tracing and discussing the fundamental principles which underlie the power to take private property for public use, define the extent of that power, and restrict its exercise.

The author is a former assistant corporation counsel of the city of Boston, and brings to his task the experience and knowledge of his subject gained during eleven years' service in the law department of that municipality. With these qualifications, he evidences an intelligent appreciation of what is due from a text-writer to his readers in the way of a lucid and logical presentation of his subject-matter. His book is not a mere compilation of syllabi, but is patently the result of a study and comparison of the cases themselves, and the bare statements of the holdings of the courts are supplemented by the author's use of his reasoning powers in comparing the decisions and making deductions therefrom, as well as in argument on principle in the absence of direct authority.

Nor has Mr. Nichols hesitated on occasion to point out what he conceives to be misapprehensions of the law by the courts, giving his reasons for dissenting from particular decisions. Instances of this are not numerous — the author is by no means a captious critic of the courts — but where they appear are cogent and worthy of careful consideration.

Mr. Nichols's literary style is simple, direct, and altogether pleasing, and his arrangement of the subject-matter of his book is, as intimated above, logical. He first discusses, with reference to the exercise of the power of eminent domain, the fundamental powers of the sovereign state; then jurisdictional limitations as between the different states and as between a state and the federal government; next generally and briefly the provisions of the federal and state constitutions applicable to eminent domain — first and most important, that property shall not be taken for public use without just compensation, and second that no person shall be deprived of life, liberty, or property without due process of law. The subject being thus introduced, the greater part of the book is devoted to analysis and discussion of the "just compensation" clause, with specific treatment of what constitutes a taking, including additional servitudes and water rights; what constitutes property; what constitutes the public use; and what constitutes just compensation. After this the author examines in detail the due process clause, which is generally applied only when for some reason the just compensation clause cannot be successfully invoked, and the text concludes with a series of short chapters on the rights of the condemnor.

The mechanical features of the book, such as paper, typography, and binding, are excellent. The index may be fairly rated as good, though it would have been improved by a freer use of cross-references or by noting particular matters under a greater number of catchwords.

To sum up, the work seems to be exceedingly well done, and the book may be expected to take a place among constitutional studies of permanent value.

News of the Profession.

THE TENNESSEE STATE BAR ASSOCIATION met in Chattanooga on June 23. An account of the meeting will be given next month.

DEATH OF ONTARIO JUDGE. — Hon. Charles Alexander Weller, judge of the County Court of Petersboro, Ont., died at that place on June 5, aged seventy-nine.

THE ILLINOIS STATE BAR ASSOCIATION held its annual meeting at Peoria on June 24 and 25. The proceedings will be reported in our next issue.

OUTING OF D. C. LAWYERS. — The members of the bar of the District of Columbia held their annual shad bake on May 14, at Marshall Hall.

THE IOWA STATE BAR ASSOCIATION held its annual meeting at Marshalltown on June 24 and 25. An account of the meeting will be given in this column next month.

WELL-KNOWN GEORGIAN A SUICIDE. — William C. Brunson, law partner of United States Senator Bacon and himself a leader of the Georgia bar, committed suicide on June 5 at Macon, Ga., by shooting himself through the head.

NEW ASSISTANT ATTORNEY-GENERAL. — President Taft has appointed William R. Harr, of the District of Columbia, an assistant attorney-general of the United States to fill the vacancy caused by the appointment of Alford W. Cooley to the Arizona Supreme Court bench.

THE RHODE ISLAND BAR ASSOCIATION held its annual summer outing at the Pomham club, Providence, on June 5. The meeting was of a purely social nature, its chief feature being a dinner which was presided over by Dexter B. Potter, the president of the association.

DEATH OF NOTED IDAHO ATTORNEY. — Stewart S. Denning, one of the most noted criminal lawyers of Idaho, died on June 4, at Moscow, Idaho, from a complication of kidney troubles. Two years ago he was the Democratic candidate for Attorney-General of Idaho but was defeated.

APPOINTED TO MINNESOTA SUPREME COURT. — Governor Johnson has filled the vacancy on the bench of the Minnesota Supreme Court, caused by the resignation of Judge Elliott, by appointing Thomas D. O'Brien, of St. Paul. Judge O'Brien was formerly State insurance commissioner.

DISTINGUISHED CONNECTICUT LAWYER DEAD. — William H. Ely, of the New Haven law firm of Ely, Zacher & Ely, and one of the most prominent members of the Connecticut bar, died in New Haven on May 26, at the age of fifty-three years. He was graduated from Amherst and was admitted to the bar in 1877.

JUDGE FREAR MADE GOVERNOR OF HAWAII. — Chief Justice Walter F. Frear, of the Hawaiian Supreme Court, has been appointed governor of Hawaii. Governor Frear was born in California in 1866. He is a graduate of Yale University and the Yale Law School. He was first appointed to the Hawaiian bench in 1893 and became chief justice in 1900.

DEATH OF ILLINOIS SUPREME COURT JUDGE. — Hon. Guy C. Scott, associate justice of the Illinois Supreme Court, died in Galesburg on May 24 from the effects of an attack of appendicitis. Judge Scott was but forty-six years old. He was elected to the Supreme Court in 1903 and was chief justice of the court in 1906–'07.

THE ARKANSAS STATE BAR ASSOCIATION held its twelfth annual meeting at Hot Springs on June 1. Among the papers read were "The Development of the Law of Private Corporations," by President John M. Moore, of Little Rock; "Mining Law," by Cummings Radcliffe, of Little Rock; and "Special Legislation," by S. H. Mann, of Forest City.

DEATH OF PROMINENT UTAH LAWYER. — Hon. Henry P. Henderson, ex-judge of the Supreme Court of Utah Territory, died in Salt Lake City on June 3, in his sixty-sixth year. He was appointed to the Utah court in 1886 by President Cleveland. At the time of his death he was the senior member of the Salt Lake City law firm of Henderson, Pierce, Critchlow & Barrette.

MCBRIDE MADE JUDGE OF OREGON SUPREME COURT. — The vacancy in the Supreme Court of Oregon, created by the transfer of Mr. Justice Bean to the federal bench, has been filled by the appointment of Judge Thomas A. McBride, of Oregon city, to serve until the election in November, 1910. Judge McBride has been circuit judge of the fifth judicial district of Oregon for the last seventeen years.

ALASKAN JUDGE ASKED TO RESIGN. — It is stated that United States Judge Silas H. Reid, of the third division of Alaska, has been requested to tender his resignation. According to the charges filed against him, Judge Reid appointed his brother-in-law receiver for an Alaskan railroad at a salary that would have soon wiped out the road. An investigation of this and other charges is said to have produced a conviction that a change would be desirable. Judge Reid was appointed from Oklahoma by President Roosevelt.

ELLIOTT GETS PHILIPPINE JUDGESHIP. — On May 21 President Taft sent to the Senate the nomination of Judge Charles B. Elliott, of the Minnesota Supreme Court, as a justice of the Supreme Court of the Philippines to succeed Judge Willard, recently named as federal judge in Minnesota in place of Milton D. Purdy. Judge Elliott has served on the Minnesota bench for twenty years, and is also known as a writer on legal subjects.

DELAWARE'S NEW JUDGES. — On May 19 Governor S. S. Pennewill announced the following selections for the new judiciary of Delaware, to serve for a term of twelve years: Chancellor, Charles M. Curtis, of Wilmington; chief justice, James Pennewill, of Dover; resident associate justice for New Castle county, Daniel O. Hastings, of Wilmington; for Kent county, William H. Boyce, of Georgetown; for Sussex county, Henry C. Conrad, of Wilmington; judge at large, Victor B. Woolley, of Wilmington.

EX-GOVERNOR CROUNSE, OF NEBRASKA, DIES. — Hon. Lorenzo Crounse, formerly a justice of the Supreme Court of Nebraska and subsequently governor of the State, died in Omaha on May 13, aged seventy-five. He was a native of New York and first went to Nebraska in 1864, being in the same year made a member of the territorial legislature. In 1866, when Nebraska was admitted to statehood, he became a judge of the Supreme Court and served one term of six years, declining a renomination. In 1892 he was elected governor of the State.

NO RAISE FOR PENNSYLVANIA JUDGES. — The members of the Pennsylvania judiciary will have to worry along on their present salaries for a while longer. Governor Stewart has vetoed the bill passed at the last session of the legislature increasing the salaries of the judges by an aggregate annual amount of $553,000. The reason assigned for his action was that the generous legislators had made appropriations greatly in excess of the revenues and it was necessary for the governor to make large reductions in order to prevent a deficit.

EX-JUDGE DENIS O'BRIEN DEAD. — Hon. Denis O'Brien, for seventeen years a justice of the New York Court of Appeals, died at his home in Watertown, N. Y., on May 18. Judge O'Brien was born in Ogdensburg in 1837. He was admitted to the bar in 1861 and was elected attorney-general of the State in 1883. After serving for two terms he was elected a justice of the Court of Appeals and served from 1890 to December 31, 1907, when he retired on the age limit. A fine specimen of Judge O'Brien's reasoning powers is to be found in his opinion dissenting from the judgment of the Court of Appeals which upheld the conviction of Albert T. Patrick for the murder of Rice, the millionaire philanthropist.

AN ADVENTUROUS LAWYER. — Charles W. Caldwell, the attorney of Columbus, Ind., who sprang into fame during May by seeking to institute a suit in the District of Columbia to oust Secretary of State Knox from the cabinet, seems to have

the faculty of staying in the limelight once he gets there. A few days after the announcement of his attempted proceeding against Mr. Knox he again figured in the public prints by reason of his wife suing him for divorce, and three days after that he was shot by the irate father of a sixteen-year-old school girl, to whom he had been paying surreptitious court, was pursued by bloodhounds, and finally landed in jail. At last accounts he was still in durance vile, writing a novel.

JUDICIAL APPOINTMENTS IN CANADA. — During May Mr. Harrison A. McKeown, of St. John, N. B., and Mr. Jeremiah H. Barry, of Fredericton, N. B., were appointed judges of the Supreme Court of New Brunswick, and Mr. Thomas H. Metcalfe, K. C., of Winnipeg, was appointed to fill the vacancy on the High Court bench of Manitoba. Four new Ontario judges were appointed as follows: Mr. J. H. Denton, K. C., of Toronto, to be junior judge of York county; Mr. J. McKay, K. C., of Sault Ste. Marie, to be county judge of Northumberland; Mr. G. M. Rogers, K. C., of Peterborough, to be judge for Thunder Bay and Rainy River; and Mr. C. Russell Fitch, of Stouffville, to be judge at Fort Francis. The two last-named judgeships were created at the last session of the Ontario legislature.

DATES FOR STATE BAR MEETINGS. — The eleventh annual meeting of the North Carolina State Bar Association is scheduled for June 30 and July 1 and 2, at Asheville, with James W. Osborne, of New York city, as the annual orator; and on the same days the Pennsylvania lawyers are to meet at Bedford. The Ohio association convenes at Put-in-Bay, July 6 to 8. The Kentuckians are to hold their convention in Paducah on July 7, and the Indiana association will hold its thirteenth annual meeting in Indianapolis on July 7 and 8. The meeting of the Maryland State Bar Association is to be held at Old Point Comfort, Va., on July 7 to 9, that of the Virginia association will be held at Hot Springs on August 10 to 12, while the Michigan attorneys will hold their meeting in Detroit, August 24–28 at the same time that the American Bar Association is in session there.

GEORGIA STATE BAR ASSOCIATION. — The twenty-sixth annual meeting of the Georgia State Bar Association was held at Warm Springs on June 3 and 4. As usual the proceedings were opened by the address of the president, Joseph Hansell Merrill, of Thomasville. He devoted his attention to the question of how the courts could be made more useful and respect for them increased. A paper on "The Treaty-making Power of the President and the Senate; How Affected by the Powers Delegated to Congress, and by the Powers Reserved to the States," was read by W. H. Fleming, of Augusta. "The Legal Aspects of the Recent Amendment to the Constitution of Georgia Regulating the Elective Franchise," were discussed by A. Pratt Adams, of Savannah, and Walter A. Harris, of Macon, while the question of governmental guaranty of bank deposits was dealt with by Geo. S. Jones, of Macon, and Hamilton Douglas, of Atlanta. There was a general discussion relative to the best method of selecting judges, in which all of the speakers agreed that appointment by the governor and confirmation by the senate was far preferable to popular election. The officers elected for the ensuing term were as follows: President, T. M. Cunningham, of Savannah; vice-presidents, Judge Joel Branham, of Rome, John E. Donaldson, of Bainbridge, W. K. Miller, of Augusta, A. W. Evans, of Sandersville, and A. H. Thompson, of La Grange; secretary, Orville A. Park, of Macon; treasurer, Z. D. Harrison, of Atlanta.

LOUISIANA STATE BAR ASSOCIATION. — The annual meeting of the Louisiana State Bar Association was held at Alexandria on May 28 and 29 with President W. S. Parkerson in the chair. After addresses of welcome by Mayor J. P. Turregano and R. S. Thornton, of Alexandria, had been responded to by George C. Walsh, of New Orleans, Governor J. Y. Sanders delivered an address regarding the proposed revision of the Civil Code of the State. He was followed by R. E. Milling, chairman of the commission to revise the code, who outlined the plan to be followed in making the revision. The next speaker, Joseph P. Blair, of New Orleans, addressed himself to the subject of the community property laws and the necessity for revision in that regard. Other addresses on the first day were: "What Laws Should Be Required to Compel Registry in the Changes of Title to Real Estate, When the Title Comes through a Succession or through the Community?" by J. C. Theus, of the Monroe bar; "Should the Laws Requiring the Convocation of Family Meetings for Certain Purposes Be Repealed?" by Henry P. Dart, of New Orleans; "Should the Divorce Laws of Louisiana Be Amended, and if so, to What Extent and in What Particulars?" by M. H. Carver, of Natchitoches. In the evening there was a reception and dance at the Rapides Club. The second day was opened with a paper by H. Garland Dupre, of New Orleans, regarding the disabilities of married women. After the heated debate, which this address stirred up, had subsided, E. H. Randolph, of Shreveport, read a paper relative to the rights of illegitimate children. President Parkerson delivered the usual review of the legislation enacted during the year, and was followed by Bernard McCloskey, of New Orleans, who spoke in regard to the New Orleans Court House. The last speaker was Attorney-General J. B. Stirling, of Mississippi, whose subject was "The Relation between Inter- and Intra-state Commerce, and the Power of the States to Regulate the Same." In the evening the annual banquet was held at the Hotel Bentley. The following officers were elected: President, E. H. Randolph, of Shreveport; vice-presidents, Joseph W. Carroll, of New Orleans, Frank P. Stubbs, Jr., of Monroe, Philip S. Pugh, of Lake Charles, and Edward T. Weeks, of New Iberia; secretary and treasurer, Charles A. Duchamp, of New Orleans.

English Notes.

NEW KING'S COUNSEL. — During May nine barristers were elevated to the dignity of King's Counsel upon the recommendation of the Lord Chancellor. These are the first calls within the bar in fifteen months.

AN OFT-KISSED BOOK. — In connection with the movement in England to abolish the practice of "kissing the book," it is interesting to note that a public-spirited citizen has recently presented the Essex Court of Sessions at Chelmsford with a new Bible to take the place of one which had been kissed by the unwary public since 1750.

ACTORS NOT ELIGIBLE FOR JURY DUTY. — An actor who was summoned to serve on a London jury during May set up as an excuse that under an old Act of Parliament, which has never been repealed, he was a rogue and a vagabond, and therefore ineligible. After a perusal of the statute the judge was forced to admit the validity of the claim and the Thespian was excused from service.

THE DECEASED WIFE'S SISTER AGAIN. — An echo of the long-continued struggle over the question whether a widower should be allowed to assuage his grief by wedding the sister of his late lamented spouse has been heard in the English courts recently. It seems that a straitlaced churchman, one Canon Thompson, notwithstanding the Act of Parliament declaring such marriages legal, has made bold to treat the parties thereto

as "open and notorious evil livers." His right to maintain such a position was made the subject of litigation and the courts have decided against the worthy canon.

ENGLISH BARRISTER ADVOCATES AMERICAN SYSTEM. — At the recent annual dinner of the London Association of Accountants, Mr. Marshall Hall, K. C., responding to the toast of "The Legal Profession," said that he belonged to the small minority in England who hoped that the day would come when there would be a fusion of the two branches of the legal profession — first, in the interest of clients, and secondly, in that of the profession itself — so that there would no longer be the anomaly of the solictor instructing counsel when the whole matter could be dealt with by one and the same person.

DISBARRED BY GRAY'S INN. — Disbarment proceedings are of such rare occurrence in England that considerable comment has been aroused by the recent action of the benchers of Gray's Inn in disbarring Mr. Shyamaji Krishnavarma because of his open and violent agitation against the English administration in India. At the same time the benchers suspended the calls to the bar of two Indian students charged with the same offense. In England the inns of court have exercised disciplinary powers over barristers and law students since the thirteenth or fourteenth century, and the courts have no jurisdiction of such matters except by way of appeal.

BARBER'S LIABILITY FOR CUTTING PATRON'S EAR. — At Clerkenwell County Court recently Mr. Thomas Rees Sydenham-Jones, a denizen of Lincoln's Inn and a gentleman of considerable importance if names count for anything at all, brought an action against a Holborn barber for slicing a piece out of the plaintiff's ear while cutting his hair. It was shown that the wound inflicted upon Mr. Thomas Rees Sydenham-Jones was about an inch in length and that a piece of the cartilage of the external ear had been dexterously removed. In consequence of this unfortunate occurrence the plaintiff averred that he was put to an expense of £3 for medical attendance, that he was prevented from earning fees to the extent of £5, and that he was subjected to pain and suffering which could be atoned for by nothing short of £7. He also denied having said, as alleged by the defendant, "Accidents will happen, and it can't be helped." Furthermore he indignantly controverted the defendant's assertion that he had himself inserted his ear between the blades of the scissors. Judge Edge after hearing the evidence came to the conclusion that the defendant had not exercised such care as a prudent man would use in cutting his own hair and accordingly awarded Mr. Sydenham-Jones £10 10*s*. as a balm for his wounded ear.

CONSTRUCTIVE MURDER AND THE DEATH PENALTY. — The tendency away from the infliction of capital punishment which has been so markedly manifest of late exhibited itself in a recent decision of the English Court of Criminal Appeal in the case of Rex *v.* Rubens. Two brothers had been convicted of murder in the first degree. It appeared that the killing arose out of an unpremeditated quarrel and that only one of the brothers had used the knife which caused the death, and there was nothing to show that the other even knew that his brother had such a weapon available when they started the unlawful assault. While the court rejected the application for leave to appeal, Mr. Justice Darling pointed out that, though a court of justice could not interfere with a sentence properly passed according to the existing state of the law, it might well be that those who were intrusted with the prerogative of mercy would draw a distinction in the crime and in the punishment of the man who actually, and of the other who only technically, committed murder. But notwithstanding Mr. Justice Darling's suggestion the Home Office declined to interfere with the sentence and allowed the law to take its course, for which the Home Secretary has been rather severely criticised.

LIBEL OF PERSON WHOSE EXISTENCE UNKNOWN TO WRITER. — In Jones *v.* Houlton, noted in the *Law Times* of May 29, 1909, at page 100, the Court of Appeal recently made a novel ruling in the law of libel. The Paris correspondent of the defendant's newspaper wrote in regard to social events at Dieppe as follows: "There is Artemus Jones with a woman who is not his wife, who must be, you know — the other thing. . . . Really, is it not surprising how some of our fellow countrymen behave when they come abroad? Who would suppose by his goings on that he was a churchwarden at Peckham?" etc. The plaintiff's baptismal name was Thomas Jones, but from the time of his school days he was known as Thomas Artemus Jones, and a number of witnesses testified that on reading the article they thought it referred to the plaintiff. Both the writer of the article and the editor of the paper testified that the name was purely imaginary, so far as they were concerned, that they did not know of the plaintiff's existence, and that the article was not intended to refer to him. The Court of Appeal dismissed an appeal from a verdict in plaintiff's favor for £1,750, holding that if the jury found that a substantial number of ordinary sensible persons who knew the plaintiff would think the article referred to him, it was immaterial that the persons who wrote and published it did not know of his existence and did not intend to refer to him.

GEORGE MEREDITH AND THE LAW. — In a recent issue the *Law Journal* says editorially: "Like many another of our most famous writers — like Thackeray and Stevenson — George Meredith was originally destined for the profession of the law. But in his case literature soon claimed her child for her own, and he never drew or pleaded from a brief. His was no divided allegiance, as that of his great predecessor Fielding, who was none the less the greatest law reformer of his age because he was its greatest novelist. George Meredith was neither lawyer nor law reformer, though he protested powerfully in his criticism of life against the unequal condition of our divorce laws for the two sexes. To his soaring mind the lawyer seemed to be concerned with pettifogging things and to be a poor minister of justice. 'We may compare,' he says in 'One of Our Conquerors,' 'a lawyer to the rustic finger on a fiddle-string for the murdered notes that you get out of your practical instrument.' Yet he could draw a kindly picture of the lawyer, as in the character of Ripton Thompson, the faithful friend of Richard Feverel, who, when supposed to be devoted to the study of Blackstone and professing to be busy with 'The Law of Gavelkind,' is discovered composing a vivid account of the case of Vulcan *v.* Mars. The contest between the philosopher and the lawyer is an ancient one, and Meredith was in the party of those who feel that the law is too slow and conservative, not sufficiently responsive to the progressive movement of humanity, nor sufficiently sympathetic with the biddings of nature. In his philosophical sublimity he did not perhaps do justice to the value of the institutions by which alone the progress of society can be ordered and stable. If, however, he had

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not the legal mind, he had what is greater — the power to inspire ideals of humanity and social progress which it is the final aim of the law to advance."

DISSATISFIED WITH JURY SYSTEM. — An evidence of the growing dissatisfaction among business men with trial by jury as applied to commercial litigation is to be found in a recent resolution of the English National Chamber of Trade condemning the jury system in such cases. Commenting on this resolution the *Drapers' Record* (London) remarks: "The chamber 'views with apprehension' the decisions of common juries on commercial questions, and most people will agree that a good commercial judge is a safer tribunal. The fact is that to weigh evidence and arrive at a just and correct conclusion necessitates training of a kind that a few common jurymen have received. Hence, cases are frequently decided upon side issues or irrelevant matters introduced by clever counsel to prejudice the other side and mislead the jury. Too often, it is to be feared, the verdicts of common juries are secured by such forensic methods, with the result that a miscarriage of justice occurs and the law is brought into contempt. We think it was one of our great lawyers who shrewdly observed that, with a good case, you were sure to win before a judge, but with a bad case you had a chance with a jury. From another point of view, few business men would object to see the whole system abolished, so far as civil cases are concerned. The waste of time entailed by jurors-in-waiting is often very serious, and the juror receives small consideration from the court officials. And if, after all, the jury's labors result in general dissatisfaction, would it not be well to dispense with their services? The National Chamber of Trade proposes that commercial courts should be presided over by judges specially qualified for that kind of business. That being arranged, we could witness the end of the common jury without any regret."

Obiter Dicta.

A FACT. — "A river begins at its source." *Per* Baron Martin in Dudden *v.* Guardians of the Poor, 1 Hurlst. & N. 630.

A HIGHLY VALUED REPUTATION. — An ex-judge of Boston recently brought an action against several local reformers to recover $76,450,000 damages for alleged libel. However, he took nothing by his false clamor.

A GRAND IDEA. — A St. Louis justice of the peace has abandoned his judicial position and started to work as a street sweeper. Doubtless there are many streets that need sweeping in all parts of the country.

A PUZZLER. — Our curiosity has been considerably excited by the name of the defendant in Peter *v.* D'd-cock, 112 N. Y. Supp. 1143. If any of our readers can tell us how to pronounce it, we shall be greatly obliged.

AN INFERENCE OF PROBABLE CAUSE. — In a divorce suit brought by a Chicago lawyer against his wife the plaintiff testified that in all his life he had given utterance to profane language but twice and that on both occasions said language was directed at his wife.

EXPERT TESTIMONY. — In People *v.* Marx, 128 N. Y. App. Div. 828, it is held that one who has drunk whiskey for thirty years is competent to say whether a liquid he drank was whiskey. Doesn't Hamlet say something about the hand of little employment having the daintier sense?

A BRIEF SESSION OF COURT. — "The word 'term,' as used in Act No. 30, p. 56, of 1878, § 1, means the session during which the court is actually open, as contradistinguished from the continuous session, of ten minutes, provided for by article 117 of the Constitution." Third headnote to State *v.* Vicknair, 43 So. Rep. 635.

THE PARTICULAR AND THE GENERAL IN FEDERAL LEGISLATION. — "To enable the postmaster of the Senate to keep a constant supply of postage stamps for sale to Senators, fifty dollars."

"For miscellaneous items, exclusive of labor, one hundred and fifty thousand dollars." Appropriations for the Senate, 1908, 35 U. S. Stat. at Large 187.

BROUGHT IT HOME TO THE JUDGE. — In charging the jury in a gambling case a Pennsylvania judge recently said: "Many apparently overlook the fact that, under the laws of this State, every game played for a stake is gambling, whether it is progressive euchre, bridge whist, dominoes, checkers, or dice, and is a violation of law; and the participants are liable to be indicted and compelled to face the jury." When his honor had concluded, counsel for the defense stepped up and laid before him a copy of a local paper containing an account of a bridge party at which the judge's wife had won a prize.

A PROPHECY AS TO AERIAL NAVIGATION. — Chief Justice Bleckley once said that so long as man was unable to navigate the air at will he could and would be controlled, and there would be law and order on the face of the earth; but if ever he was successful in navigating the air, go whither he would, with vessels of sufficient tonnage to carry war supplies, he could not and would not be controlled, and the world would become pandemonium. Memorial, 128 Ga. 857.

RIGHT BACK AT HIM. — In North Carolina a few years after the close of the Civil War there was appointed to the Superior Court bench a lawyer by the name of Little who was somewhat quick of temper and prone to give utterance to it in the most forcible language at his command. On his elevation to the bench he experienced considerable difficulty in overcoming this tendency. It is told of him that in one of the first cases before him one of the counsel, nettled by an adverse ruling, remarked testily: "We will appeal from *that*." "Appeal and be damned to you," replied the judge.

SURE OF HIS GROUND. — At a banquet given during March by the New York County Lawyers Association, Mr. Justice Jenks, of the Appellate Division, Second Department, told of a lawyer who in a trial before him sought to prove the truth of the facts alleged in the complaint by offering in evidence the defendant's demurrer thereto. "When I firmly pointed out to him his trifling error," said the judge, "he replied: 'Well, I will content myself with an exception, but now I offer the demurrer on grounds beyond all criticism, as part of the *res gestæ*.'"

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200 MASS. PUBLISHED. — It may be of interest to young lawyers preparing to purchase a library to know that volume 200 of the Massachusetts reports has recently come from the press. Other States in the two hundred class are Illinois, Missouri, and Pennsylvania, their latest volumes being respectively 238 Ill., 214 Mo., and 221 Pa. The Federal Supreme Court reports are also in this class, the last volume being 211 U. S. A hundred years hence a complete collection of law reports will be fairly expensive.

DUE PROCESS OF LAW. — The following, except for the matter of names, is a report of the proceedings in a case in the Indianola, Neb., police court: "In the Matter of the State of Nebraska *vs.* John Doe, the complaint of William Jones, marshall of the city of Indianola, before me, Thomas Brown, Police Judge. On oath deposes and says the defendant was drunk in violation of the ordinance of the city of Indianola.

"By arrest of the marshal the defendant appeared in court and after due consideration was fined $5.00 and costs amounting to seven and 25/100 dollars, which he refused to pay. I therefore ordered the marshal to allow the defendant to pay the fine and costs by work on the street. This he also refused to do. The marshal then chained him to the town pump. But thinking this perhaps unlawful he was turned loose, and agreed to work on the streets, which he did."

WITH DUE POMP AND CIRCUMSTANCE. — A firm of attorneys in Madison, Wis., having requested a justice of the peace to secure for them certain information for the purpose of impeaching the credibility of some witnesses in a pending case, were both surprised and awed when they received the following imposing document:

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"We the undersigned, citizens of ——— County, ——— City and ——— County in the State of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings form a more perfect Government and insure domestic tranquility and promote the general welfare, do establish this our oaths and sworn testimony of them to the following courts of the United States of America, viz. towit:—United States Supreme Court, United States Court of Appeals, United States District Court, United States Circuit Court, States Courts, Districts Courts, Circuit Courts, Justices Court, and to all Judges, Magistrates and jurors, pertaining to the said courts, we do severally and jointly depose and say that we have known ——— a resident of ——— City, ——— County, Wisconsin, for a period of three years or longer, and on being first and legally summoned to appear in any of the said courts above written, to testify and give evidence relative to the reputation of the said ——— for integrity, truth and veracity, and before said courts, being first duly sworn on oath, say that the reputation of the said ——— for integrity, truth, and veracity is bad.

"We also further depose and say that we are not prejudiced, nor bear malice against the said ———, but form our opinions on that which is spoken about him by others."

MANY of the old cases are strange and absurd; so also are some of the modern ones. Wilmot, J., Pillans *v.* Van Mierop, (1764) 3 Burr. Part IV., p. 1671.

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QUESTIONS DR. TAYLOR'S DISCOVERY.

To the Editor of LAW NOTES.

SIR: Not to be captious, but merely in the course of truth, I beg also to except to Dr. Hannis Taylor's statement contained in the initial article in the current month's North American Review in a quasi-review of his book, The Science of Jurisprudence, that he was the first person to note the germ of the Roman or Civil Law in our present private law as opposed to the English idea which dominates our so-called public law. The masterful John Fiske, in a chapter entitled The Destiny of Man, in his work Cosmic Philosophy, and again in the chapter, The Roman and English Idea, in his work The Beginnings of New England, develops with startling clearness the knowledge of the influence of the *jus gentium* on our present Anglo-Saxon "private" jurisprudence. If my recollection is

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right Mr. Fiske gave utterance to these thoughts as early as 1880, but surely before Dr. Taylor, whatever the date. It is quite likely, however, that Dr. Taylor either was not familiar with his Fiske or had, in the lapse of years, forgotten the lesson the great historian and philosopher has given to a grateful posterity.

ALFRED HOLZMAN.

CINCINNATI, OHIO.

KEEPING HISTORY STRAIGHT.

To the Editor of LAW NOTES.

SIR: On page 39 of your May issue, 1909, LAW NOTES, there is a quotation from the *Saturday Evening Post* relative to Judge McKenna's appointment to the Supreme Court, in which President Harrison is referred to as the appointing power. It is well to keep history straight, if there is any history in connection with this matter. Judge McKenna was appointed to the office of associate justice of the Supreme Court on the 21st day of January, 1898, and was consequently not appointed by President Harrison, but President McKinley, who was then in office.

Very truly yours,

DES MOINES, IA. A. H. MCVEY.

A BLAST FROM ARKANSAS.

To the Editor of LAW NOTES.

SIR: I notice in LAW NOTES of May, an article written by John C. Meyers, and I am forced to call attention to the false argument. In the first place, he overlooks the fact that a corporation, that he holds so dear to his "warm heart," is composed of many rich men, who have invested in this corporation because they have a surplus and are not individually responsible for the wrongs, mistakes, and failures of themselves and employees in charge of the corporation, only to the extent of the money put in, when the individual who engages in business is responsible to the last cent he is worth, which makes a wide difference in a personal and business sense. As a matter of fact, corporations and corrupt parties that create them, are responsible for the feeling and opinions that people have for and toward them.

So far as legislation, the corporations, which include those that own them, have the best, with the legislation and with the courts, for they have millions to corrupt legislation and often even the courts. Look at Congress taxing the people to death and refusing to reduce the "tariff," and look at the Supreme Court, deciding that an income tax was unconstitutional, when before, for a hundred years, while the same court was clean, the said tax had been held to be constitutional. History has it that the Supreme Court was divided as to the opinion to be rendered, and on the next day one of the judges went over and a majority decided the tax unconstitutional. Every respectable lawyer in America knows that the law establishing income tax was and is constitutional and that a majority of that court was corrupted when they delivered that opinion.

The people are not fools, all the time, and no honest man believes the hired corporation articles written by such "smart fellows" as Mr. John C. Meyers.

As to what will become of this government and the liberties of the people, that can only be known by waiting. One extreme leads to another. Ever since the Civil War commenced this injustice has been going on — certain parties said they were going to free the "poor negro" and now they have enslaved both negro and white man, and the thieves take the "pot" and curse because the people complain and "kick a little." I thank God because there is a "hot Hell" and because when the rascals get there justice will then be dealt out.

P. H. PRINCE.

CONWAY, ARK.

ROOSEVELT AND THE JUDICIARY.

To the Editor of LAW NOTES.

SIR: Your publication of the scurrilous attack of one Basil Jones on ex-President Roosevelt in May number shows coarseness and malice. LAW NOTES professes to represent the profession — that it is not a private, personal character assassin — but down it goes.

From what corporate interests, pray, does Basil Jones draw his pay?

A. J. TRUITT.

PUNXSUTAWNEY, PA.

[The criticism of the judiciary contained in Mr. Roosevelt's article was unwarranted and due to his unfamiliarity with a fundamental legal principle. As an organ of the profession and in justice to the bench, Mr. Jones called attention to these facts, and did so without vilification or scurrility. — ED. LAW NOTES.]

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Law Notes

AUGUST, 1909.

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Power of Congress to Enact Discriminatory Statutes.

Is the Congress of the United States entitled to enact discriminatory legislation, such as is prohibited to the States under the Fourteenth Amendment? This question is raised but not determined in *District of Columbia* v. *Brooke,* 214 U. S. 138. A statute in force in the District of Columbia was attacked and its unconstitutionality urged upon the ground that "the act lacks the requisite uniformity, inasmuch as it undertakes to provide one law for property of resident and another for property of non-resident owners in said District."

The Supreme Court found it unnecessary to decide the power of Congress in general terms, holding that the discrimination found in the statute in question was such as would have been permitted to the States under the Fourteenth Amendment, and, if the prohibition on Congress exists, it "cannot be stricter or more extensive than the Fourteenth Amendment," which guarantees as well the equal protection of the laws as due process of law. Though unnecessary therefore to the decision of the case, the power of Congress in this respect is suggested in the following interesting passage: "The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This court, however, has just held, in the case of *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, that Congress may, in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that 'injustice and favoritism' might 'be operated thereby,' could 'have no weight in passing upon the question of power.' In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."

If, as is suggested in this quotation, there is no limitation on the power of Congress to discriminate, the "due process of law" which is binding upon the federal government under the Fifth Amendment does not include the idea of general laws operating on all alike. That this idea is included in "due process" under the Fourteenth Amendment seems certain. "Due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia* v. *Okely,* 4 Wheat. (U. S.) 235, 244. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary. *Hurtado* v. *California,* 110 U. S. 516, 535." *Caldwell* v. *Texas,* 137 U. S. 692, 697. And see *Duncan* v. *Missouri,* 152 U. S. 377, 382. Similar clauses in State constitutions have been held to prevent arbitrary and capricious classification. *Sutton* v. *State,* 96 Tenn. 696. No difference between "due process" in the Fifth and Fourteenth Amendments has ever been established, and the courts assume their identity.

The fact that in the Fourteenth Amendment a particular element of "due process" is, out of abundant caution, stated separately — the guaranty of "the equal protection of the laws" — could not affect the meaning of "due process" as already existing in the Fifth Amendment. The reasoning by which it has been established that other rights particularly enumerated in the first ten Amendments, including the Fifth, are or are not elements of "due process" under the Fourteenth, would seem equally to show that the specification of a right in the Fourteenth would not be decisive, even of the opinion of the framers of the amendment, as to the scope of "due process" in the Fifth Amendment.

Perhaps the "equal protection" clause of the Fourteenth Amendment added nothing to the rights created by it, while the existence of that clause has tended to obscure the full meaning of "due process."

Upon the whole, it would seem probable that Congress is limited as are the States in adopting discriminatory legislation, and that the limitation is found in the due process clause of the Fifth Amendment.

Bona Fide Divorces.

A PERENNIAL subject of interest is divorce and divorce legislation. Facilities for divorce are around us on every hand, and they are certainly availed of liberally by the ill-mated, and yet with the phenomenon so common, our leaders of thought seem unable to arrive at a conclusion as to whether it is desirable or otherwise. Somewhat unusual was the address of ex-Justice Henry B. Brown, of the federal Supreme Court, on this subject before the Maryland Bar Association recently. He alluded to the

attitude of the churches toward the subject, remarking: "The head of the Roman Church in America, a man for whom I have profound respect, has painted divorce as 'a monster, licensed by the laws of Christian States to break hearts, wreck homes, and ruin souls.'" The judge's own view, however, founded on his long experience, does not bear out the ecclesiastical estimate.

"It is not perceived," he says, "why the partnership created by marriage should so far differ from a commercial partnership that one may be dissolved at pleasure while the other is absolutely indissolvable. A proper regard for the interests of the state as well as the preservation of domestic happiness would seem to require that when the whole object of the matrimonial compact had been defeated by the habitual, persistent, and uncontrollable conduct of either party, and that relation which should represent the acme of human happiness is made to stand for all that is most repugnant to our desires and anticipations, a severance of the ties should be permitted. I cannot recall a divorce fairly obtained, without fraud, and upon due and personal notice to the other side, that did not apparently redound to the welfare of the parties and prove a real blessing."

The analogy between a commercial partnership and the marriage relation is open to obvious criticism, but the false analogy does not detract from the force of the subsequent reasoning or from the weight of his deliberate judgment as to the good effected by *bona fide* divorces.

An Interesting Experiment.

An account of an interesting experiment in the practical working of divorce litigation which may tend to lessen the dangers of fraudulent decrees comes to us from St. Louis. Taking a hint apparently from the French practice, where in such cases the state is always represented, Judge Williams of the Circuit Court has conceived the plan of appointing, with the consent of the plaintiff, an *amicus curiæ* in all uncontested divorce cases, whose duty it is to investigate the facts of the case, cross-examine the witnesses for the plaintiff, and to guard against collusion. Judge Williams speaks modestly but hopefully of his plan. The *amicus curiæ*, he says, "brings facts to the attention of the court which would never be thought of were it not for the investigation made. Several cases assigned to my room have been dismissed voluntarily, and while I do not know it to be a fact, I am told that three cases were dismissed because they could not stand investigation. I think I have been able to observe a class of cases more meritorious than those instituted prior to the appointment of the *amicus curiæ*."

Advertising Divorce Attorneys.

Judge Williams in discussing some of the evils in the present divorce situation refers to the advertising divorce attorney as follows: "We have lawyers who make a living out of divorce cases and nothing else. Some of them advertise to procure divorces on easy terms. Men and women who have been conducted through the experience tell their friends how easy it is to be separated at small expense through legal process. The suggestion of the advertisement and the gossip bring business to the legal charlatan." A curious illustration of ingenious advertisement on the part of a South Dakota specialist on such matters has been called to our attention in a neat pocket pamphlet entitled "The Law of Marriage, Annulment, Domicile, and Divorce." The author is the attorney himself. On the cover are the words "Price, One Dollar," but the copy at hand is stamped "Complimentary." The book contains a good deal of information of interest to gentlemen and ladies who are contemplating the desirability or feasibility of securing a divorce. The author's statements are frequently enforced by long and miscellaneous lists of citations from the courts, which impart a learned and technical atmosphere. Between each two propositions are clippings from various newspapers describing some divorce litigation in which ——— ———, attorney, represented one of the parties, and curious to relate always the successful party. It is an illustration of advertising and puffing extraordinary.

Among the baits thrown out to persons seeking a divorce with an eye to remarriage to an affinity, a table is given showing the minimum time required for acquiring domicile, securing a divorce, "and qualifying the divorced parties to contract another legal marriage." In this table South Dakota leads all the rest, seven months being given as the necessary interval from wife to wife or husband to husband. This of course fails to take account of the work of the last legislature of the State, but then this is only the "October Revision," 1908, of the "Law of Marriage, Annulment, Domicile, and Divorce."

We have never seen a more shameless exhibition of open advertisement in a department of the profession which is necessary, but is, as thus pursued, thoroughly revolting.

Portrait in Advertisement Held Libelous.

An advertisement of Duffy's Malt Whiskey in a Chicago newspaper contained a commendation from "Mrs. A. Schuman," stating that both from personal use and from her professional experience as a nurse, she has "no hesitation in recommending it as the very best tonic," etc. To this glowing testimonial was appended Mrs. Schuman's address, and the advertisement was adorned with the picture of a lady who might be presumed to be the commending nurse. In fact the portrait was that of Elizabeth Peck, a lady who was not a nurse and was a total abstainer from whiskey and spirituous liquors. Elizabeth Peck brought an action against the newspaper for libel, and for the publication of her portrait without her permission. The plaintiff's evidence was excluded at the trial in a federal court and a verdict directed for defendant, and this ruling was sustained in the Circuit Court of Appeals, 154 Fed. 330. But the plaintiff was not to be discouraged, and the United States Supreme Court has triumphantly vindicated her right to go to the jury. *Peck* v. *Tribune Co.*, 214 U. S. 185. It is held that the publication of the plaintiff's picture in connection with the letter imported that she was the nurse and made the statements set forth. "Therefore," continues the court, "the publication was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned

the publication under an alias. There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libelous the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whatever a man publishes he publishes at his peril.'"

The interesting question whether the publication was a libel the court had to discuss as *res nova*. "It was held by the Circuit Court of Appeals not to be, or at most to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whiskey is wrong, or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but while it is maintained it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote. We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm."

The broad question of whether the publication of the portrait was in itself a tort — the question of the existence of "a right of privacy" — about which the courts have differed, it was not considered necessary to examine under the circumstances of the case.

Impeachment of Sheriff for Not Preventing Lynching.

THE Alabama constitution of 1901 provides that "whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm owing to the neglect, connivance, cowardice or other grave fault of the sheriff, such sheriff may be impeached." The method thus indicated of dealing with the crime of lynching has recently been put in operation. In January last a negro named Robertson murdered the officer who was attempting to arrest him for a misdemeanor. Subsequently he was arrested and lodged in jail at Mobile. A night or two later a small company of masked men — there seem to have been not more than twenty in the mob — quietly entered the jail, overpowered the two jailers, carried Robertson away, and put him to death. The jail was a well built, modern structure, adapted to defense in case of attack. "There were," said the Supreme Court of Alabama in stating the facts, "two steel barred doors opposite each other, with a space between, leading to the guard-room, where the jailers were, but it had been customary to leave the outer door open, as it was on this occasion; also that there were strong wooden doors protecting the street entrance to the jail building, and that there was also a strong door leading into the basement, which was under the charge of the engineer." It also appeared that the sheriff had been warned that there was talk of lynching the negro. Upon the facts the Alabama court on impeachment proceedings against the sheriff declared that "after a careful consideration of all the evidence we are satisfied beyond a reasonable doubt that the sheriff, Frank Cazalaz, Sr., has been guilty of neglect within the meaning of the constitution, which has resulted in the taking of a prisoner from jail and his being put to death." The sentence, in accordance with the demands of the law, was that the sheriff be removed from office.

Upon the facts as found it is hard to see how any other conclusion could be arrived at. As is well said by the court:

> When the State or county has provided a suitable and well-constructed jail, with strong doors, not only to prevent the escape of prisoners, but also to prevent the unlawful entrance thereto, it is questionable whether it is not the duty of the sheriff at all times to make use of these means of protection against possible interruption. The sheriff cannot presume that those who desire to invade the premises will inform him of the fact or make such a demonstration on the streets as to advertise their intentions. However that may be, when a crime of peculiar enormity has been committed, exciting public indignation; when it is known that such crimes always bring about suggestions that the prisoner be taken out and lynched, and when, in addition to that, the suggestion is made to the sheriff that there is a probability of an attempt to take the prisoner and lynch him, ordinary prudence would suggest that the sheriff should at least give orders that all the doors by which an entrance may be effected into the jail should be closed and take other precautions when he leaves it for the night.

We call attention to this case as presenting an interesting experiment in the methods of dealing with a terrible evil. If the sheriff's neglect really made the lynching possible and was, in a sense, its occasional cause, removal from office is an utterly inadequate punishment. In a practical way, however, it may be found more deterrent than heavier punishments which courts and public opinion would be loath to inflict.

Recovery of Money Paid on Forged Checks.

AS a rule when money is paid under a mistake of facts, as upon a forged instrument, it may be recovered back and laches or negligence in making the payment or discovering the forgery will not affect the payor's right to recover, unless the person receiving payment has suffered loss or damage on account of the negligence. *Appleton Bank* v. *McGilvray*, 4 Gray (Mass.) 518; *Kelly* v. *Solari*, 9 M. & W. 54. An exception exists in the case of bills of exchange paid by the drawee where the drawer's signature is a forgery (*Price* v. *Neal*, 3 Burr 1354), in the case of a bank paying what purport to be its own notes where its own name is forged (*United States Bank* v. *Georgia Bank*, 10 Wheat. (U. S.) 333), and in some analogous cases (*Smith* v. *Mercer*, 6 Taunt. 76). In these cases the acceptance or adoption of the instrument upon payment is regarded as a binding admission of its genuineness and creates an estoppel unless the person to whom payment is made has by his own fault or negligence misled the payor, or given currency to the paper by indorsing it before receiving payment. *National Bank* v. *Bangs*, 106 Mass. 441; *Breenwald* v. *Ford*, 21 S. Dak. 28, 109 N. W. 516.

Where the forgery is in the indorsement or in the body of the instrument, the exceptional rule of *Price* v. *Neal*

has no application and recovery can be had. *Nat. Bank of Commerce* v. *Nat. Mechanics' Banking Assoc.*, 55 N. Y. 211. But even in these cases, an exception to the general rule governing payments by mistake has been contended for, to the effect that payments made on commercial paper cannot be recovered back, where there has been unreasonable delay on the part of the payor either in discovering the forgery or in giving notice thereof to the person paid, without regard to whether the delay has caused loss or damage to the other party. This is the proposition asserted in *National Exch. Bank* v. *U. S.*, 151 Fed. 402, and it is there made the basis of an elaborate judgment.

Upon the writ of error, however, the case has been reversed in the federal Supreme Court, *U. S.* v. *Nat. Exch. Bank*, 214 U. S. 302. Pension warrants drawn by a pension agent on the subtreasurer of the United States, with the indorsements of the payees forged thereon, were discounted by the bank, which secured payment from the United States. The United States brought an action to recover the money after the forgeries had been discovered. The Circuit Court of Appeals held, upon the principle stated above as to commercial paper, that the United States by unreasonable delay in giving notice of the discovery of the forgery had lost its right to sue. The Supreme Court, however, holds that the exceptional rule as to commercial paper is confined to the cases noted above and is not applicable to the case of a forged instrument. It is further considered that the bank by presenting the warrants and receiving the money thereon warranted the genuineness of the instruments. *White* v. *Continental Bank*, 64 N. Y. 316.

This conclusion renders it "unnecessary to consider whether if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery, if there was lack of such diligence, it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay."

The case assumes for convenience that the pension checks or warrants are commercial paper.

Japan and the New Penology.

JAPAN is the wonder of the world in the facility with which its people adopt and assimilate the most advanced ideas of Western civilization. According to the *Wide World* magazine our Far Eastern neighbor has carried prison reform to a point where a sentence to confinement is a positive blessing and a source of happiness. The delights of Japanese prison life are thus described:

"There a convict may earn enough money while in jail to maintain his family, has the best of food and lodging, is taught a trade, and, if he wishes, pursues the study of foreign languages. At Sugamo a qualified teacher instructs the younger prisoners in reading, writing, and arithmetic. Prisoners of twenty and upward who are in seclusion for the first time are taught geography and history.

"If, on entering the prison, a man states that he has a knowledge of English, he is carefully examined by a linguist and the extent of his knowledge fathomed. He is then allowed to pursue his studies, the necessary books being supplied by the authorities. When there are several in together a teacher is obtained from outside and lessons are given regularly.

"In the offices a record of each prisoner is kept during his stay. This serves to show whether the convict is prompt to obey the officials; whether he shows affection for his parents and relatives; whether he writes letters home; and whether he makes progress or not in his scholastic studies."

The new methods appear not to have been successful in reforming the criminals, and we are told that Japanese officials "confessed that of robbers, burglars, thieves, and swindlers, sixty per cent. came back to the prison. Of those who had been twice imprisoned, sixty per cent. returned; of the first offenders forty per cent. found their way back."

Perhaps there are differences in the problem to be worked out in a country where everything is in an experimental stage, or racial traits may have to be considered. At any rate in the West the new ideals as to the treatment of criminals are constantly being adopted more and more widely. The basic conception is reformation rather than punishment or revenge, and this conception is worked out by probation, the indeterminate sentence, and parole for convicted criminals. With varying details, the system is now in force in some twenty of the United States, the last to be added to the list being Pennsylvania, where the law embodying the new principles went into effect last month.

Every human institution is liable to abuse, and in proportion as an institution becomes less mechanical and more flexible, permitting of variation in accordance with individual cases, the greater this liability. That the new penology is beneficent is proved by its results in many jurisdictions. It is in accord with the spirit of the age. The protests against it which are occasionally heard may fairly be attributed to unwise local administration, for whose defects the system is made responsible, or to an inveterate conservatism which looks askance on all new things.

A Judicial Estimate of Voltaire.

PETER J. QUINN, desirous of extending his acquaintance with literature, contracted with a book concern for the complete works of Voltaire in forty-two volumes for the sum of $200. The books were delivered and Mr. Quinn began his research. Imagine his horror and surprise to find that the morals of the French philosopher as exhibited in the forty-two volumes of his works rendered the aforesaid volumes parlous reading for himself and for his family. He thereupon brought an action to recover the price of the books, alleging that the sale was conditional upon the approval of himself and family. The trial court gave judgment in his favor, upon the theory, however, not that the sale was upon approval, but that the consideration was illegal, because the books were immoral.

The Appellate Term of the New York Supreme Court has reversed the judgment, taking a more liberal view of the morality of a classic. In delivering judgment Justice Seabury said:

"The 'Philosophical Dictionary' is not only a reservoir of sarcasm and wit, but it has exerted a profound influence in favor of a humane and rational administration of the law. For the other work offered in evidence, 'The Maid of Orleans,' so much cannot be said. Offensive as some of the verses of this book undoubtedly are to the taste of our day, yet I do not think we can declare a con-

tract for its sale illegal on this account. Its vices are those of its age. Frederick the Great admired it, and paid it the doubtful compliment of imitation, and Condorcet regarded it only as an attack upon hypocrisy and superstition. Less prejudiced critics than these condemn it severely, and even admirers of Voltaire regret that there are passages in it which have dimmed even the fame of its author. In passing judgment upon it, perhaps, it is not too much to ask that it should be considered in the spirit which the author of 'The Treatise on Tolerance' did so much to make general.

"Judgment of the court below is based upon a few passages in each of these works, and these passages have been held to be of such a character as to invalidate the contract upon which the action has been brought. These few passages furnish no criterion by which the legality of the consideration of the contract can be determined. That some of these passages, judged by the standard of our day, mar rather than enhance the value of these books, can be admitted without condemning the contract for the sale of the books as illegal. The same criticism has been directed against many of the classics of antiquity, and against the works of some of our greatest writers, from Chaucer to Walt Whitman, without being regarded as sufficient to invalidate contracts for the sale or publication of their works."

Upon no other theory could a purchase of many of the world's classics be possible; works many of which have had a profound and ennobling influence on human thought and history, or some acquaintance with which is essential in an educated man.

The Law and the Police.

IF the controversy between Judge William J. Gaynor and Police Commissioner Bingham, of New York city, did no other good than to give prominence to the following utterances of Judge Gaynor respecting the limitations of police authority, it was well worth while. LAW NOTES advises judges, magistrates, police officers, and lawyers to ponder these words well:

> If any alleged criminal offense be committed the police should summon or bring the offender before a court or magistrate, whose decision should be respected and followed by the police authorities and not railed at or defied. It is for the judicial department of government — namely, the magistrates and courts — to determine what constitutes criminal offenses, and not for police officials or other officials, however high.
>
> Law and order must be enforced, but in an even and orderly manner. It cannot be enforced in this or any other community in our free country in a lawless manner. No police or other official is permitted under our system of government to take the law into his own hands. Ours is a government of laws, not of men, and no official may proceed except in the way and within limits prescribed by law for his direction and government.
>
> I feel that it is my duty as a judicial officer to speak plainly about this matter, for all of our judges are being applied to weekly for these injunctions to prevent threatened lawless police raids, when the whole matter ought to be settled by orderly arrests and hearings thereon. Many doubtful questions are involved, and our laws do not permit them to be summarily and violently dealt with by any official, but only upon due judicial hearing.

BOARDS OF LEGAL DISCIPLINE.

LAWYERS who are familiar with the machinery provided in the various States for disciplining members of the bar who have been guilty of unprofessional conduct have long deplored the fact that in most, if not all, of the jurisdictions the machinery is too cumbersome and too difficult to set in motion, to accomplish adequately the purposes for which it is designed. The direct result of that state of affairs is that many offenders escape the legitimate consequences of their misconduct; and the consequential result is that the unpunished offenders are not only left to pursue their improper practices undisturbed, but the profession as a whole loses the benefit of the lesson that the lawyer who breaks the law, or ignores the canons of ethics, incurs a debt to the profession and to society at large which he must pay.

Many remedies for this unfortunate state of affairs have been suggested. Some of these remedies have been found upon trial to be unsatisfactory, and others have been rejected without trial as being palpably inadequate to reach the root of the evil. It has remained for Charles A. Boston, Esq., of the Bar of New York city, to suggest a remedy which promises, if adopted, to make the procedure for disbarment or other disciplinary punishment so simple and so effective that it will be an easy matter to inflict appropriate punishment upon offending lawyers. Briefly speaking, Mr. Boston's idea is to establish in each jurisdiction a body or board of lawyers which shall have somewhat the same disciplinary jurisdiction over members of the legal profession that the medical boards of the various States have over physicians. This idea suggested itself to Mr. Boston after he had made a careful and exhaustive study of the proceedings whereby the medical boards of the various States investigate charges of unprofessional conduct against physicians, and determine the punishment, if any, to be imposed upon the offenders.

In May, 1908, acting in response to the invitation of the American Bar Association to make suggestions concerning the code of ethics which the Association's Committee on Ethics had proposed for adoption, Mr. Boston published an article in the *Green Bag*, making the following recommendations for the reformation of the bar in his own State of New York:

1. The adoption of a code of ethics having the force of law.

2. The establishment of "a body composed of practicing lawyers similar to a court for the trial of impeachments, by which any complaint of any infraction of the code could be heard summarily and a warning or reprimand administered, and with the power in flagrant cases to recommend suspension or disbarment, and pursuant to such recommendation to become relator against the accused in a proper judicial proceeding in which he would be entitled to a full hearing *de novo* and without prejudice, and with the right to review by certiorari its proceedings ending in a warning or reprimand." This legal body should be empowered to administer minor penalties only. Flagrant cases should be heard *de novo* in a court.

Subsequently Mr. Boston became a member of the Committee on Professional Ethics of the New York County Lawyers' Association; and in the course of the deliberations of that committee over a code of ethics proposed for adoption by the association, he advanced his suggestion

for the establishment of a disciplinary body of lawyers. At the request of Mr. Everett P. Wheeler, chairman of the committee, Mr. Boston and Mr. Paul Fuller, acting as a subcommittee, formulated the suggestion in the following shape, and it was adopted by the full committee, and submitted to the Board of Directors for approval:

"This association deems desirable the institution of a proper disciplinary body or bodies, composed of members of the bar and distinct from the Appellate Division of the Supreme Court, empowered by law to receive complaints and conduct investigations in accordance with legal procedure, into the conduct of members of the bar in violation of a lawyer's legal duties and in flagrant disregard of professional ideals, with power to administer reprimands and counsel reforms, and with power to recommend, upon the record of their proceedings, to an Appellate Division of the Supreme Court, the suspension or disbarment of any person whom it shall deem deserving of such punishment; the Appellate Division to act upon such recommendation and report, as it may, upon consideration of the evidence before and the findings of such body, consider proper and in accordance with established principles of law, all evidence, however, in any such proceeding, to be taken by such body."

On receiving the report, the Board of Directors requested the Committee on Professional Ethics to draft a proposed law providing for the establishment of the disciplinary body recommended in the report; and in response to this request a bill has been drafted and submitted to the committee, but has not been acted upon finally. The salient features of the proposed bill are as follows:

(1) There shall be instituted in each of the judicial departments of the State a board to be known as the Board of Legal Discipline.

(2) Each Board of Legal Discipline shall be composed of three duly admitted lawyers of good personal and professional repute, residing in the Judicial Department for which they are appointed, who have actively practiced their profession within the State, or who have been Judges of Courts of Record within the State, for at least ten years at the time of their appointment.

(3) The members of each such Board shall be appointed by the affirmative vote of a majority of the Justices of the Appellate Division of the Supreme Court for the Department for which such Board shall be appointed, and shall hold office for the term of three years, except that the first appointees shall be appointed for one, two, and three years, respectively. Members shall be eligible to reappointment.

(4) One of the members of each Board shall be designated to preside at meetings, and another member shall be designated to act as Secretary, and the office of the Secretary, within the Judicial Department, shall be the office of the Board for the receipt of complaints and the filing of papers. The Secretary shall keep a record of the proceedings of the Board and of its action in all cases. Such record shall be deemed a public record and shall be open to public inspection; but testimony taken by the Board, and proceedings upon complaints filed with the Board, shall not be a part of such record nor be entered therein, except that, in case the finding of the Board, upon any complaint, shall be adverse to the accused, then the finding of the Board and the disposition thereof by the Board, and, in case of appeal, by the Court or Courts of Appeal, shall be entered in such record. The Board may meet by designation at any place within its Judicial Department which shall, in its judgment, best suit the convenience of the parties and witnesses and accomplish the ends of substantial justice.

(5) The justices empowered to adopt general rules of practice for the Supreme Court shall adopt rules for the government of and observance by practitioners of law within the State of New York, a violation of which shall subject the offender to discipline or investigation by one of said Boards.

(6) Any person or persons, corporate or otherwise, may lodge a verified written complaint against any lawyer practicing in any of the courts of the State. Upon receipt of such complaint, the Board shall fix a time and place for its hearing, which time, however, shall not be less than thirty days after the filing of the complaint. A copy of the complaint, with notice of the time and the place of the hearing, must be served upon the accused at least twenty days before the date fixed for the hearing. The rules of evidence obtaining in the Supreme Court for the trial of civil actions shall govern the reception of evidence by the Board. Any member of the Board may administer oaths and issue subpœnas in any matter pending before the Board, and attendance may be compelled, and failure to obey any subpœna may be punished by the Supreme Court. Any party to any matter pending before any Board may be represented by counsel.

(7) Any Board may investigate, of its own motion and without any formal complaint, any matter of professional misconduct coming to its attention, and may present charges against the accused, giving him due notice thereof. In the event the Board shall present charges, it cannot pass judgment, but shall report its charges, together with the testimony taken thereon, to the Appellate Division of the Department of its appointment, for action by such Appellate Division.

(8) When a complaint is filed with the Board, it shall take testimony and make findings in respect to the charges. If it shall find that the charges are not sustained, or that the charges, if proved, would not merit punishment, it shall dismiss the complaint; but if it shall find that the charges have been sustained and that the offense is one meriting punishment or rebuke, it shall enter its findings on its records. It may reprimand, rebuke, and warn any person whom it may find to merit such punishment, but if it be of the opinion that the offense merits disbarment or suspension, then it shall report its findings, with the testimony, to the Appellate Division in the Department of its appointment, for such action as such Appellate Division shall see fit to take.

(9) The facts in all cases brought before any Appellate Division for the punishment of any member of the Bar, shall be examined in the first instance by one of the said Boards, and, for that purpose, any case brought before any Appellate Division may be remanded to the Board for that Department. The findings of fact of any such Board may be reviewed in the same manner as the findings of fact on a trial before a judge or referee under the Code of Civil Procedure. An appeal lies to the Appellate Division from any final order of any such Board.

(10) Each member of each Board shall receive out

of the State treasury compensation at the rate of ten dollars per day for each day or fraction thereof on which he is necessarily engaged in the business of said Board.

(11) Costs and taxable disbursements may be awarded to or against any party by said Board upon any final decision, except that no extra allowance shall be awarded.

(12) Upon the filing of any complaint with the Board, the complainant shall pay to the Secretary a fee of fifty dollars, which shall be deemed a taxable disbursement; but for sufficient cause shown, any Board, in its discretion, may dispense with the payment of such fee.

(13) The Secretary of each Board shall, on demand, furnish under seal copies of papers on file with him, at the same charge therefor as Clerks of the Supreme Court in his Department are empowered to exact.

(14) The necessary expenses of the Board and their Secretaries are to be paid out of the State treasury.

(15) The judgments which may be entered against accused persons, under any of the provisions of the bill, shall be considered to be entered for the purification of the administration of justice, and shall not be deemed punishments, and shall not prevent the prosecution of the offenders for any offenses which they may have committed against the criminal laws of the State, and shall not be deemed to merge, extinguish, or release any such offense, or any cause of action, civil or criminal, against the offender.

A consideration of the provisions of the proposed law shows very clearly that the procedure provided therein for disciplining offending lawyers is very much simpler than that now existing in the State of New York at least. Under present conditions in New York, the usual course is for the complainant to lodge a complaint with the Committee on Discipline or Grievance Committee of a bar association. That committee, if it considers that the charge is one which, if sustained, merits punishment, requests the accused to appear before it, and if his explanation is not satisfactory, takes testimony tending to establish or disprove the charge. If the committee reaches the conclusion that the charge is sustained and that the accused should be punished, it presents the matter to the Appellate Division, which hears argument on the question whether the complaint should be dismissed or should be investigated further, but not upon the question whether the accused should be punished. If it decides that the matter should be investigated further, it appoints a referee to take testimony and report his findings. Upon the submission of the referee's report, another argument before the Appellate Division is had, and the court then determines either that the complaint shall be dismissed or that the accused shall be punished, and, in the latter event, inflicts the appropriate punishment.

It will thus be seen that under the present procedure in New York, the testimony is taken twice, and that there are three arguments, one before the Discipline Committee of the bar association, and the other two before the Appellate Division of the Supreme Court. Furthermore, the committees on discipline have no power to compel the attendance of witnesses, and therefore it may often happen that a complainant is unable to obtain evidence to sustain a valid charge, with the result that the offender escapes punishment. Under the procedure provided by the proposed law, the testimony will be taken only once, and the Board before which it is taken will have full power to compel the attendance of witnesses.

It is possible that the moral effect of the imposition of a disciplinary sentence would be greatly heightened if it were attended with a public degradation similar to that inflicted upon offenders against the military law. It has often been said that military officers who have subjected themselves to punishment dread most that portion of the punishment which requires that they be stripped of their insignia publicly and in the presence of their fellow soldiers. Is it not likely that it would add to the solemnity of the occasion and make the lesson more effective if a lawyer sentenced to disbarment or suspension were (if still within the jurisdiction of the court) required to be present in person to receive the sentence?

No discussion of the efficacy of disciplinary measures would be complete without reference to the unfortunate manner in which our bar associations are often hampered by the complainants, upon whom they have to rely for the evidence to sustain the charges made. Every lawyer who has served upon the discipline committee of a bar association knows that there is a disposition on the part of some lawyers to use these committees merely as collection agencies. It not infrequently happens that a lawyer will make a charge, involving money, against another lawyer, and that, upon being called upon thereafter by the discipline committee to present his evidence to sustain the charge, he will refuse to do so, saying that the matter has been settled to his satisfaction. This practice would seem to be as reprehensible morally, if not legally, as compounding a felony. It is perhaps true, however, that some of the lawyers guilty of it sin from ignorance — that they have no adequate conception of ethics or the proprieties — in a word, that they are unmoral rather than immoral. If this be true, the remedy lies in education. The immoral lawyer must be punished for his misdeeds, but the unmoral lawyer must be educated up to a proper understanding of his duties and responsibilities. It is encouraging to see that this view of the case is receiving wide recognition, as is evidenced by the fact that so many bar associations have adopted or are preparing to adopt canons of ethics, and that at least one law school (that of Fordham University) has made a course in ethics a compulsory and essential part of its curriculum.

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New York, N. Y.

POLICE POWER AND SKY-SCRAPERS.

SOME interesting points are considered in the case of *Welch* v. *Swasey*, 214 U. S. 91, recently decided by the Supreme Court of the United States. The case comes from Massachusetts and involves the constitutionality of legislation limiting the height of buildings in the city of Boston. A statute declared that the city of Boston should, with respect to the height of buildings allowed, be divided into two districts, a business district (A) and a residential district (B). The boundary between the districts was to be determined by a commission. In section B no building was to exceed the height of one hundred feet, while buildings between eighty and one hundred required the express authorization of a commission. The commission refused

its permission for a building one hundred and twenty-four feet six inches in height in district B, and the aggrieved landowner sought by mandamus to compel the issuance of a permit, alleging that the law was an unconstitutional interference with property rights, "because in fact the real purpose was of an æsthetic nature, designed purely to preserve architectual symmetry and regular sky lines, and such power cannot be exercised for such a purpose." He further alleged unjust discrimination between the two districts into which the city was divided, claiming that he was thus deprived of the equal protection of the laws.

The Supreme Court of the United States sustains the statute as against both objections, and affirms the ruling of the Massachusetts court in 193 Mass. 364. Although it has been held (*Com.* v. *Boston Advertising Co.*, 188 Mass. 348) that the police power cannot be exercised for purposes purely æsthetic, yet the regulation of the height of buildings involves other and most important considerations, danger from fire and from the falling of walls after fires being among the number. As the public safety is a lawful object of the police power, and the regulation of the height of buildings bears a substantial relation to public safety, the statute cannot be pronounced unconstitutional as directed solely to æsthetic ends.

With regard to the question of the validity of classification, great weight is laid on the decision of the Massachusetts court. The Supreme Court declares that in respect to such questions as the validity of classification, the opinion of the State court, which is more familiar with the local conditions than the Supreme Court can be, will be regarded with the utmost respect. "The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the State court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong. In this case the Supreme Judicial Court of the State holds the legislation valid, and that there is a fair reason for the discrimination between the height of buildings in the residential as compared with the commercial districts." Continuing it is said: "We are not prepared to hold that this limitation of eighty to one hundred feet, while in fact a discrimination or classification, is so unreasonable that it deprived the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power."

Incidentally it is declared that no federal question is raised by an alleged delegation of legislative power to the commission under the act. "The State court holds that kind of legislation to be valid under the State constitution and this court will follow its determination upon that question." In other words, the separation of the three departments of government is not an element of due process of law under the Fourteenth Amendment.

SIR WILLIAM BLACKSTONE.

It is a trite reflection, and yet one which is always recurring to us as we survey life or glance down the long vista of history — on what seeming accidents the great issues of the world turn. If John Shakespeare, woolstapler and mayor of Stratford-on-Avon, had not come down in the world, the chances are that his gifted son would never have gone to seek his fortunes in London, and "Hamlet," "Macbeth," and "Othello," "Romeo and Juliet," and "The Midsummer Night's Dream," all that glorious pageant of immortal scenes and characters, would have been among the things that never were. If Sir Walter Scott had not by chance gone seeking some fishing tackle in a lumber room at Abbotsford and lighted upon the forgotten manuscript of "Waverley," we might never have had that incomparable series of romances — the Waverley Novels. If Blackstone's father — the silk mercer of Cheapside — had not died before his son entered the world, the author of the Commentaries on the Laws of England might have lived and died a prosperous tradesman — a citizen of "credit and renown," like worthy John Gilpin, and nothing more. But fate ordered otherwise. The silk mercer died, and young William Blackstone fell to the care of his maternal uncle, Mr. Thomas Bigg, an eminent surgeon of London, by whom, at the age of seven, he was put to school at what his biographer calls "an excellent seminary" — to wit, the Charterhouse, the school of Addison and Steele, of Thackeray and Leech.

John Wesley and the Charterhouse.

Among his contemporaries was a boy destined to play as notable a part in the religious history of the world as Blackstone in the domain of law — young John Wesley. Wesley's father, so Southey tells us, had made his son promise to run four times round the school "green" before breakfast every morning, which he religiously did, and to this habit the great religious reformer ascribed the health which he enjoyed during a long and active life. Well would it have been for Blackstone if he had followed a similar regimen; but all his life he had, as his brother-in-law tells us, an "unhappy aversion" to taking exercise, a lethargical habit of body or constitutional indolence, very prejudicial to his health.

Perhaps we may explain it as James Smith, one of the authors of the once famous "Rejected Addresses," did a similar debility on the part of Mr. Strahan, the King's printer. He had met this gentleman at a dinner party, and the next morning sent him the following *jeu d'esprit:*

"Your lower limbs seemed far from stout,
When last I saw you walk;
The cause I presently found out
When you began to talk.

The power that props the body's length,
In due proportion spread;
In you mounts upwards, and the strength
All settles in your head." *

Blackstone's vital spirits "settled in his head." Of mental energy he had no lack. So assiduous was he in his studies that at fifteen he had got to the top of the school and was fit for Oxford, whither he went shortly afterwards as an exhibitioner of Pembroke College — the same college where, a few years before, Samuel Johnson, a poor scholar, with characteristic independence of spirit, had flung away the new shoes which some one, in pity of his shabbiness, had put at his door. Here at Oxford Blackstone assimilated much Latin and Greek, logic and mathematics, and achieved a fellowship at All Souls' He even composed a treatise on architecture, but the "mistress of

* Mr. Strahan was so pleased with this compliment that he left the author a legacy of £3,000.

his willing soul" was poetry. It was a poetical age; the stars of Swift and Pope were setting, but the stars of Thomson and Akenside, of Shenstone and Gray, were rising, and Blackstone had undeniably a very pretty gift that way — already at school he had won a gold medal for a poem on Milton, and the fugitive pieces which he afterwards collected show that he might have won an honorable place among the poets of the Augustan age of England. The motto he prefixed to these effusions was: *"Non lusisse pudet, sed non incidere ludum,"* which may be roughly rendered: "I shame not to have had my fling; shame's his who cannot stop."

Adieu to Poetry.

Conscious that poetry was not his life work; conscious, probably, of his own limitations in the art, he bade farewell to his muse in some excellent lines and girded himself up for his severer studies. But, though he forsook the muse, yet, like Charles Lamb when he had bidden a similar farewell to the "great plant" tobacco, Blackstone loved "to live in the suburbs of her graces." In particular, he kept up his study of Shakespeare and, says Malone, "the notes which he gave me on Shakespeare show him to have been a man of excellent taste and accuracy, and a good critic." Apropos, for instance, of Katherine's words in "The Taming of the Shrew,"

> "Pardon, old father, my mistaking eyes
> Have been so late bedazzled with the sun,
> That everything I look on seemeth green,"

Blackstone says: "Shakespeare's observations on the phenomena of nature are very accurate. When you have sat long in the sunshine, the surrounding objects will often appear tinged with green. The reason is assigned by many of the writers on optics."

"Sin, death, and hell," "Richard III." "Possibly," says Blackstone, "Milton took from hence the hint of his famous allegory."

The Law Student of the Eighteenth Century.

It was no primrose path which he had chosen for himself in this study of the law, but a steep and thorny track. There was nothing in the legal London of the eighteenth century of the well-ordered academic life to which he was used at Oxford; no system of profession training. The age of moots and readings was past and that of "pupilizing" had not begun. This is how he sketches the novitiate of the law student of his day: "We may appeal to the experience of every sensible lawyer whether anything can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and inexperienced youth in the most dangerous season of life is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his inquiries — no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world and by a tedious, lonely process to extract the theory of law from a mass of undigested learning, or else by an assiduous attendance on the courts to pick up theory and practice together sufficient to qualify him for the ordinary run of business." We have changed all that now, thanks very much to Blackstone himself. The law student of to-day has his director of studies, his students' library, his lectures, his prizes and exhibitions, his Law Students' Notes, his moots, his Hardwicke and other debating societies. Had Blackstone himself enjoyed the last advantage — practiced declamation in a debating society — he might have won his way to professional distinction earlier; for, as his biographer admits, he was "not happy in a graceful delivery and a flow of elocution, and so acquired little notice and little practice." Well was it, however, for the world that he did not, for as a busy junior he could never have laid the foundations of that wide legal learning which shines forth in the Commentaries. We, looking back, can see this, but Blackstone only saw that he had been waiting vainly on fortune, the fickle goddess, for nearly seven years after his call (1746), and he made up his mind to woo her smiles no longer, but to retire to his fellowship at All Souls'.

Blackstone as an Oxford Don — Lectures on Law.

A most useful member of the college he proved. As bursar he put the college muniments in order, reformed the system of accounts, completed the Codrington Library, and by an essay on "Collateral Consanguinity" did much to relieve the college from troublesome claims by remote kindred of the founder. As a delegate of the University Press he made himself master of the mechanical part of printing, remedied abuses, and rescued the Press from the "indolent obscurity" into which it had sunk. As visitor of Queen's College he was instrumental in building the fine façade of that college which now fronts the High street. Wherever he went Blackstone brought with him — all his life — an active, orderly, reforming mind, and an enormous capacity for taking pains.

It happened, just about the time of his quitting London for Oxford, that the professorship of civil law at Oxford fell vacant, and Murray, the future Lord Mansfield, then solicitor-general, introduced Blackstone to the Duke of Newcastle, the chancellor of the university, and warmly recommended him as eminently fitted to fill the vacant chair. For his grace, however, this was not enough, unless he could rely on his support for the administration, and he said to Blackstone: "Sir, I can rely upon the judgment of your friend, Mr. Murray, as to your giving law lectures in a style most beneficial to the students; and I dare say I may safely rely on you, whenever anything in the political hemisphere is agitated in the university, to exert yourself on our behalf?" The answer was: "Your grace may be assured that I will discharge my duty in giving law lectures to the best of my poor ability." "Aye, aye," replied his grace, "and your duty in the other branch, too?" Mr. Blackstone coolly bowed, and a few days after Dr. Jenner was appointed professor. This firmness of Blackstone in refusing to sell himself and his liberty of conscience to Newcastle — the arch intriguer of the day — as the price of the professorship, is highly honorable to him, for the loss of the chair was no slight disappointment. But by Murray's advice he adhered to his plan of delivering lectures on law on his own account at Oxford, and the experiment proved eminently succussful. The lectures were attended, we are told, by a "very crowded class of young men of the first families, characters, and hopes," and Blackstone's fame as a lawyer grew in proportion. The King paid him the compliment of asking him to read his lectures to the Prince of Wales, afterward George III. An edition of the Great Charter and of the Charter of the Forest which he published at this time added much to his reputation, as did also a learned treatise by him on the point — then exciting great interest — whether copyholders had a right to vote for the county; and so, when a year or two after a professor was to be appointed under Mr. Viner's bequest to the university, Blackstone was unanimously chosen. In a word, the tide had turned, and Blackstone had conquered. A cherished project of his was to make the professorship the centre of a school of law at Oxford. Mr. Viner had by his will given "all his personal estate, books, etc., for the constituting, establishing, and endowing one or more fellowship or fellowships and scholarship or scholarships in any college or hall in the said university as to the Convocation shall be thought most proper for the students of the common law."

Blackstone's proposal was to place Mr. Viner's fellows and

scholars under their professor in a hall or college of their own, and thus establish a society for students of the common law similar to that existing for the study of the civil law at Trinity Hall, Cambridge. It was an admirable scheme, but Convocation, true to its time-honored conservatism, negatived the proposal. Thenceforward Blackstone, balked of his favorite project, withdrew himself very much from Oxford, and devoted himself to his growing practice in London.

In 1759, on the strength of his rising fame, he had taken chambers again in the Temple, and his own reports (King's Bench), covering the whole period from his call to his death (1746–1779), show that his services were increasingly in demand. From his fresh start onwards his name is constantly appearing in the arguments before Lord Mansfield. In 1760 he was invited by Chief Justice Willes to take the coif. In 1763 he became Solicitor-General to the Queen and a Bencher of his Inn — the Middle Temple. But it was not until 1765 that the first volume of his famous Commentaries — based on his lectures — made its appearance.

Goldsmith and Blackstone at Brick Court.

It is always interesting to identify the spot where a work of genius originated — whether it is Milton's cottage at Chalfont, the birthplace of "Paradise Lost;" or Bedford Gaol, where Bunyan dreamed the dream of his wonderful allegory; or 10 Gough square, where Johnson composed his dictionary; or the *berceau* at Lausanne where Gibbon penned the concluding words of his Decline and Fall. The Commentaries were written on the first floor (south) of 2 Brick Court Temple, but not without interruption from a lively neighbor.

Oliver Goldsmith, recently enriched to the amount of £500 by the profits of "The Good-natured Man," had invested the money in the purchase of chambers on the second floor of Brick Court, exactly over Blackstone's head, and these chambers were the scene of much hilarious festivity. Sometimes it was a "cheerful little hop," at other times a supper party with blindman's buff, forfeits, and games of cards, diversified by Irish songs, or a minuet danced by Goldsmith with an Irish lady, in which the poet testified the exuberance of his spirits by wearing his wig back to front, or tossing it gayly up to the ceiling. These overhead revels naturally did not assist the progress of the great work, and were the subject of frequent complaint on the part of the doctor of laws against the doctor of physic.

Another interesting circumstance is related by Dr. Scott. "Blackstone," he says, "a sober man, composed his Commentaries with a bottle of port before him, and found his mind invigorated and supported in the fatigue of his great work by a temperate use of it." A similar story is told of Addison. When composing his Spectators at Holland House he kept a bottle of wine at each end of the long gallery, and refreshed his faculties by a glass as he paced to and fro.

A Scene in the House.

With his return to practice in London, Blackstone entered Parliament as member for Westbury, the same year as Thurlow was returned for Tamworth. But Blackstone had not Thurlow's talents for parliamentary life. Wilkes, the notorious agitator, had just then set the country in a blaze with an obscene and impious libel, and in consequence had been expelled from the House of Commons, and Luttrell elected in his place. This election of Luttrell — known as the Middlesex election — was challenged by the Whigs as unconstitutional on the ground that Wilkes's expulsion did not create in him an incapacity of being re-elected. The Tories brought on a motion to declare Luttrell duly elected, and Blackstone, being put forward to support it, gave it as his opinion that Wilkes was by the common law disqualified from sitting in the House. Grenville, on behalf of the Whigs, retorted by reading a passage from the Commentaries (page 162) stating the causes of disqualification, none of which applied to Wilkes. Instead of defending himself, Blackstone, according to Philo Junius, "sunk under the charge in an agony of confusion and despair." "It is well known," says the same writer, describing the scene, "that there was a pause of some minutes in the House from a general expectation that the doctor would say something in his own defense, but it seems his faculties were too much overpowered to think of those subtleties and refinements which have since occurred to him." Smart party journalism of this kind must not be taken too seriously. Blackstone was silent partly because he was not naturally a ready debater, and partly because your deep thinker necessarily takes longer to adjust his ideas. But Sir Fletcher Norton — an expert debater — came to his rescue, and turned the laugh against Grenville: "I wish," he said, "the honorable gentleman instead of shaking his head would shake a good argument out of it."

The passage in question from the Commentaries furnished, no doubt, a capital *argumentum ad hominem* for debating purposes, but it was not inconsistent with Blackstone's parliamentary view. It enumerated the disqualifications for serving in Parliament, not mentioning the case of expulsion, which, no doubt, Blackstone had not thought of before, and concluded with these words, "but, subject to these restrictions and disqualifications, every subject of the realm is eligible of common right." In subsequent editions of his work Blackstone added exclusion from the House to the list, and hence arose the practice at Whig banquets of giving as a toast "The First Edition of Blackstone's Commentaries." Whatever the merits of the controversy, its result was to disenchant Blackstone with parliamentary life. It taught him the lesson — to use his own words — that "amid the rage of contending parties a man of moderation must expect to meet with no quarter from any side." This is a defect of our party system very much in evidence to-day. Parliament is no place for the man of independent mind who is not prepared to model his views to the requirements of party discipline.

Domestic Life.

Blackstone had a natural taste for domesticity, but marriage would have vacated his fellowship, and prudence was a leading trait in his character. "O Fortune!" exclaims his love-tormented contemporary, the poet Thomson:

> "O Fortune, wilt thou ever prove
> An unrelenting foe to love:
> And when we meet a mutual heart
> Come in between and bid us part:
> Bid us sigh on from day to day,
> And wish and wish the heart away,
> Till youth and genial years are flown
> And all the joy of life is gone."

Fortune was not so unkind to Blackstone. At thirty-eight, with his practice growing, he felt justified in making the matrimonial venture, and the principalship of New Inn Hall, bestowed on him at the same time by the Vice-Chancellor, made up for the loss of his fellowship. The lady of his choice was a Miss Clitheroe, of Boston House, Middlesex, and the nineteen years he spent with her, with his children around him, were the happiest of his life. His home was at Priory Place, Wallingford — conveniently situate between London and Oxford — and here, as elsewhere, he was active in local improvements, in church restoring, road making, and bridge building — the bridge at Shillingford, well known to lovers of the Thames, is one which we owe to him. The secret of his many activities, as with other busy men, was that he was an excellent manager of his time. Melanchthon himself could not have been more

rigid in observing the hour and minute of an appointment. He never kept his audience waiting a moment. Yet he was not too busy to find time for innocent amusements. He was, says his brother-in-law, "notwithstanding his contracted brow (owing in a great measure to his being very near-sighted) and an appearance of sternness in his countenance often mistaken for ill nature, a cheerful, agreeable, and facetious companion." But all men have their failings, and his was a constitutional irritability of temper, increased in later years by a strong nervous affection. People in these days put such irritability down to "temperament," and are rather proud of it. Not so Blackstone. He was — so Lord Stowell tells us — the only man he had ever known who acknowledged and bewailed his bad temper. In 1770 he was raised to the bench as a judge of the Common Pleas, and continued to sit until his death nine years later (1779). But the great commentator on the laws of England was not destined to develop into the great judge — the rival of Mansfield or Buller. He was lacking in initiative — too cautious in his views; too scrupulous in his adherence to formalities. The reputation he has left is that of a sound and painstaking judge, not a judge of the brilliant or architectonic order.

The Commentaries.

"Law so dry! I deny it," said Lord Bramwell stoutly. "Three out of the four volumes of Blackstone are to my mind most interesting reading." This is one of Blackstone's most conspicuous merits. He was not only the first to survey the whole field of English law, but the first to popularize legal knowledge, to make English law readable by his lucid arrangement and the ease and elegance of his style. In Lord Campbell's words, he "rescued our profession from the imputations of barbarism." Take up Glanvil, Bracton, Littleton, Coke, even Hale, Foster, and Gilbert, and you feel the difference at once. Their range is narrow, their style crabbed or pedantic. Then, too, in Blackstone we have law made beautifully rational. English law, the English Constitution, is to him the perfection of common sense, and he is always calling on us to admire its wisdom and its justice. This idealizing tendency of Blackstone is one of his charms, but it is also the source of one of his defects. He is too prone to postulate a symmetry and perfection in our system of law which has not always a foundation in fact or history. Bentham complains of his "blind admiration," Austen of his "flattery" of English institutions, and his leanings towards monarchy and prerogative moved the wrath of Junius; yet when Blackstone was once advocating in the House of Commons what was considered a servile obedience he was answered out of his own book. In truth he holds admirably the golden mean. His dissertations on "Elective Monarchy," on the "Succession to the Crown," on "The Extent of the Prerogative," on our aristocracy and its freedom from the sterilizing influence of caste, are fine examples of a balanced judgment. Here is what he says on the maxim "the King can do no wrong:" "Besides the attribute of sovereignty, the law also ascribes to the King in his political capacity absolute perfection. The King can do no wrong, which ancient and fundamental maxim is not to be understood as if everything transacted by the government were of course just and lawful, but means only two things. First, that whatever is exceptional in the conduct of public affairs is not to be imputed to the sovereign, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the Crown which is necessary for the balance of power in our free and active and therefore compounded Constitution. And, secondly, it means that the prerogative of the Crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice."

Nor can the King think wrong. If he makes a wrong grant or creates an improvident franchise it is because he is deceived. Neither can he be guilty of laches — *nullum tempus occurrit regi:* "For the law," says Blackstone, "intends that the King is always busied for the public good and therefore has not leisure to assert his rights within the time limited to subjects." It is impossible here to multiply quotations, but how just — to take one more instance — are his remarks on the neglect of law by our legislators! "It is perfectly amazing," he says, "that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation — the noblest and most difficult of all. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician, and the practical professor of the laws; but every man of superior fortune thinks himself born a legislator." No wonder Chief Justice Cockburn should remark that he never took down an Act of Parliament "without a shudder."

Yet with all his excellent sense Blackstone illustrates the old truth that no man can be wiser than his age. "To deny the possibility — nay, the actual existence — of witchcraft is," he says, "at once flatly to contradict the revealed word of God."

Law Times.

Cases of Interest.

NE EXEAT TO PREVENT EMPLOYMENT BY RIVAL. — General Explosive Co. *v.* Hough, 116 N. Y. Supp. 1114, was an action for an injunction and damages for the breach of a contract whereby the defendant secured to the plaintiff corporation his skilled knowledge, services, and inventions for a period of five years. After an explosion had destroyed the plaintiff's works, the defendant accepted employment by a rival corporation in Canada. On a showing that the plaintiff corporation was, notwithstanding the destruction of its works, able and willing to fulfil its contract with the defendant, the New York Supreme Court held that the plaintiff was entitled to an order of arrest, corresponding to the old writ of ne exeat, to prevent the defendant from leaving the State and connecting himself with the Canadian corporation.

RIGHT TO INJUNCTION AGAINST DISCLOSURE OF TRADE SECRETS BY FORMER EMPLOYEE. — In H. B. Wiggins Sons Co. *v.* Cott-a-Lap Co., 169 Fed. Rep. 150, the United States Circuit Court for the District of Connecticut held that while a confidential employee who learns his employer's trade secret in the course of the employment cannot thereafter make use of it, to the employer's disadvantage, whether an agreement that he will not do so is expressed in the employment contract or only implied, nevertheless the mere hiring of such employee by a rival concern will not warrant a court of equity in the issuance of an injunction to prevent that rival from acquiring the secret knowledge. In order to justify resort to so drastic a measure it must appear that the circumstances surrounding the hiring are persuasive of the view that the ulterior purpose is evil. Mere opportunity to do wrong and a suspicion in the mind of the former employer that wrong will be done are not sufficient.

POWER OF SCHOOL OFFICERS TO CONTROL PUPIL AT HOME. — Curfew laws were outdone by a measure discussed in the case of Hobbs *v.* Germany, 49 S. W. Rep. 515, wherein the Mississippi Supreme Court found it necessary to administer a rebuke to an over-zealous set of school officers. The teachers had adopted a rule, and the trustees had ratified it, by which all pupils of the school were required to remain in their homes and study from seven to nine o'clock P. M., or be punished, either corporally or otherwise. In pursuance of this rule, the teachers

undertook to punish the plaintiff's son for attending religious services, in company with his father, on a certain evening after seven and before nine o'clock. In terms too positive to be misconstrued the court held that the rule was beyond the power of the trustees to adopt or the teachers to enforce, and sustained the granting of an injunction reinstating the plaintiff's son in the school and declaring the rule to be a nullity.

RIGHT OF POLICYHOLDER TO RESTRAIN SALE OF INSURANCE COMPANY. — An unusual question as to the rights of a policyholder in a stock life-insurance corporation came before the Appellate Division of the New York Supreme Court in Russell *v.* Pittsburgh Life & Trust Co., 116 N. Y. Supp. 841. The plaintiff, who was a policyholder but not a stockholder in the Washington Life Insurance Company, a New York corporation, sued on his own behalf and in a representative capacity for the other policyholders to obtain an injunction and the appointment of receivers so as to prevent a sale of the stocks, bonds, and property of the Washington Company to the defendant, a Pennsylvania corporation, and to prevent the defendant from doing any acts as owner of the New York corporation. Without passing on the validity of the contract of sale or the acts done thereunder, or deciding whether the sale was *ultra vires* either corporation, the court refused relief to the plaintiff on the ground that as a policyholder he had no standing in court to maintain a bill for the relief prayed.

CONSPIRACY TO DEFRAUD MAIL-ORDER HOUSES BY SENDING FOR CATALOGUES. — The use of the United States mails in furtherance of a conspiracy to defraud certain mail-order houses by sending for catalogues, samples, and estimates for work, without any intention on the part of the senders to purchase goods from the corporations with which the correspondence was had, was the subject of the indictment under consideration by the United States District Court for the District of Minnesota in U. S. *v.* McLaughlin *et al.*, 169 Fed. Rep. 302. The property out of which the defendants intended to defraud the corporations in question was alleged in the indictment to be "the possession and value of their said catalogues and samples, together with the postage and stationery used in said correspondence, and the value of the time necessarily consumed by said corporations and their clerks in making estimates and prices." A demurrer to the indictment was sustained on the ground that no overt act in pursuance of the alleged conspiracy was shown, none of the letters and postal cards set out containing any direct representation that the signer intended to purchase any materials.

LIABILITY OF MANUFACTURER OR DEALER IN SOAP FOR INJURIES CAUSED BY NEEDLE LEFT THEREIN. — In Hasbrouk *v.* Armour & Co., 121 N. W. Rep. 157, the Supreme Court of Wisconsin recognizes the rule that a manufacturer making and selling an article intended to preserve or affect human life is liable to persons who sustain injury by reason of his negligence in preparing, compounding, or directing the use of such article, if such injury might have been reasonably foreseen in the exercise of ordinary care, but holds that a manufacturer of toilet soap guaranteed to be pure and free from harmful or injurious substances is not liable for injuries inflicted upon a person using the soap who is wounded by a needle which had been unintentionally and negligently dropped into the soap mixture and had become imbedded in the soap. The ground of the decision is that the injuries, which were of a serious character, were the extraordinary, unusual, and remote consequence of the act complained of, and such as a person of ordinary prudence and discretion standing in the relation of manufacturer to the user of the soap could not be expected to foresee and guard against. It is also held that the retail dealer, who had no knowledge of the presence of the needle in the soap, could not be held liable. Justices Dodge and Barnes dissent.

INFRINGEMENT OF DRAMATIC COPYRIGHT BY MOVING PICTURES. — In Harper & Bros. *v.* Kalem Co., 169 Fed. Rep. 61, the United States Circuit Court of Appeals, Second Circuit, holds that a reproduction of a part of a copyrighted book by means of moving pictures is an infringement of the right to dramatize the book and of a sole right of performance on the stage granted by the owner of the copyright. The defendants procured persons and animals to perform in front of a moving-picture camera certain of the scenes described in Gen. Lew Wallace's "Ben Hur," and the films so produced were sold or rented to proprietors of theatoriums and others, and were exhibited for hire. The court drew a sharp distinction between the pictures themselves and the use made of them, holding that the series of photographs, on a film about 1,000 feet long, constituted a single picture, capable of copyright as such, and did not infringe the copyrighted book or drama; but that when the film was put on an exhibiting machine, reproducing the action of the actors and animals, it became a dramatization and infringed the rights of the owner of the copyright and of his licensees.

VALIDITY OF REGULATION OF TRAFFIC IN NON-INTOXICATING "NEAR BEER." — In Campbell *v.* City of Thomasville, 64 S. E. Rep. 815, the Georgia Court of Appeals defines "near beer," the sale of which is authorized by a State statute, as "that class of malt liquors which contain so little alcohol that they will not produce intoxication even though drunk to excess," and holds that notwithstanding the non-intoxicating nature of the drink, the selling of "near beer" is a business, which from its very nature is in a different class from the business of selling drugs, soda water, and similar liquids, and admits of strict regulation under the police power. It is declared that regulation may be applied to the "near beer" traffic which would be arbitrary and unreasonable if applied to other businesses. Respects in which it is held that a municipal corporation may regulate the sale of "near beer" are, in confining the places of sale to reasonable territorial limits, in requiring of the seller a good and solvent bond to keep an orderly house, in forbidding drinking on the premises, in prohibiting the keeping open of the place of sale at night or on Sundays or holidays, in prohibiting shades or screens obscuring the view of the interior of the room, and in forbidding minors to enter such places.

FAILURE TO PAY COSTS IN FEDERAL COURT AS GROUND OF DISMISSAL IN STATE COURT. — In Webb *v.* Pacific Mut. Life Ins. Co., 119 S. W. Rep. 491, the Missouri Court of Appeals held that it is no part of the business of a State court to enforce the collection of fees and the payment of costs in federal courts sitting within the State. In this case the lower court had dismissed the plaintiff's cause and refused to allow her to sue as a poor person on the theory that, not having paid the costs that had accrued in a prior prosecution of the cause in the United States courts, she was not entitled to proceed further in the litigation. It appeared, and had been adjudged in the United States Court, that the plaintiff had a meritorious cause of action, and the failure of her case in that court had been due merely to error in admitting an equitable defense in an action at law. It further appeared that the plaintiff was aged, infirm, and in poverty. The Court of Appeals, brushing aside all technicalities, held that the lower court had abused its discretion, and remanded the cause with directions to the lower court to reinstate the case and proceed in due course of law.

RESPECTIVE RIGHTS AND DUTIES OF PASSING AUTOMOBILES TRAVELING IN SAME DIRECTION. — In Mark *v.* Fritsch, 88 N. E. Rep. 380, the New York Court of Appeals applies to the movement of automobiles on the public highways the same general rules that long usage has formulated for simpler vehicles such as wagons, and holds that where two automobiles are traveling in the same direction, the front one has the superior right and

may maintain its position in the centre of the highway if there is sufficient space on the left, as prescribed by a New York statute, to enable the approaching car safely and conveniently to pass, but that if the position of the forward car in the centre of the highway does not leave such room for passage, then the forward car must, upon request or equivalent notice, if practicable and safe, so turn aside as to leave room for passage. If, at the moment, there is not sufficient room in which the forward car can turn aside, it is, of course, its right, and it is the duty of the rear car, to wait until a place is reached where this may be done. The court says, however: "In the application of these rules it is manifest that what would be construed as reasonable care and safe conduct in the case of a light and slow-moving wagon oftentimes would not amount to such conduct in the case of heavy and rapidly moving cars."

New Books.

MEDICAL JURISPRUDENCE.

Legal Medicine and Toxicology. By R. L. Emerson, A. B., M. D. (Harvard.) Pp. ix + 593. New York: D. Appleton & Co., 1909. $6.00.

The lawyer whose practice has taken him far into the field of medical jurisprudence will indorse Dr. Emerson's opinion that the subject of legal medicine is one which is "too little understood and appreciated by the general [medical] practitioner." There is no doubt that the average lawyer has a much wider knowledge of medical matters in their legal aspect than the average physician or surgeon has of the law in its relations to medicine.

This book will be of no little value to the practitioner who desires to know his legal status with regard to his patients and the public generally. Its statements of the law are commendably accurate, and while it is written avowedly for medical men, lawyers will find it equally useful in the preparation and conduct of medico-legal cases.

The subject-matter of the book is arranged in three main divisions, 206 pages of text being devoted to legal medicine proper, 183 pages to toxicology, and 187 pages to extracts from the various State statutes affecting the practice of medicine, as in effect January 1, 1909, alphabetically arranged by States for ease of reference. The first main division, that pertaining to legal medicine proper, contains twenty-three chapters covering the usual topics of this branch of jurisprudence, and apparently covering them well. In this part of the book are chapters dealing specifically with insurance, malpractice, medical witnesses, and the legal rights and responsibilities of physicians generally. The topic of mental disease, which forms so prominent a feature of most works on medical jurisprudence, is not treated by Dr. Emerson, except as it arises incidentally in the discussion of other topics, as for example on page 190, in relation to the subject of insurance. This omission is for the reason, as stated by the author, that the subject has become so specialized that it should be treated as such by an expert.

The division of the work devoted to toxicology forms in itself a reasonably complete text-book on that subject. The various poisons are taken up seriatim, in the alphabetical order of their names, and under each are discussed such matters as diagnosis, symptoms, tests, treatments, effects, lethal dose, post-mortem appearances, etc.

The book is written in a direct and attractive style, without unnecessary multiplication of technical terms, so that it makes easy and pleasant reading. Black-letter catchlines are used freely and with judgment, and aid materially in consulting the work. The index, however, might with great propriety be considerably fuller than it is. The mechanical execution leaves nothing to be desired. There are eight colored plates pertaining to the division of toxicology, besides twenty-four illustrations in the text, most, but not all, of which are in the same division.

THE ENGLISH ENCYCLOPÆDIA OF LAW.

The Laws of England: Being a Complete Statement of the Whole Law of England. By the Right Hon. the Earl of Halsbury and Other Lawyers. Vol. VI., "Compulsory Purchase of Land and Compensation" to "Constitutional Law," Parts I.–V. Pp. cxxxi + 499 and Index. Vol. VII., "Constitutional Law," Parts VI., VII., to "Coparcener." Pp. clxvi + 544 and Index. London: Butterworth & Co., 1909. Agents for the United States, Lawyers' Co-operative Publishing Co., Rochester, N. Y.

The 1043 pages of text in these two volumes comprise five titles, as follows: "Compulsory Purchase of Land and Compensation" (under which title we find a treatment of what an American lawyer would know as eminent domain); "Conflict of Laws;" "Constitutional Law;" "Contempt of Court, Attachment, and Committal;" and "Contract." Of these the title "Constitutional Law," covering 467 pages, is the longest and will perhaps be regarded in England as the most important. It contains little, however, which will be of use outside of the British dominions, or of interest to American lawyers except as matters of curiosity. Of these he will find numerous examples. He may read, if he wishes, an elaborate description of the ceremonies attending the coronation of the sovereign; he will learn that the duties and perquisites of the Lord Great Chamberlain are, among others of equal importance, to carry the King his shirt and clothes on the morning of the coronation, and to carry away for his own the bed and bedding that the King used the night before, together with his wearing apparel (his old clothes, as it were) and his nightgown; and he will be relieved to find that among the claims allowed is that of the lord of the manor of Heydon in Essex to serve the King with a towel before the banquet, no fees, however, being paid, while the lord of the manor of Addington in Surrey is entitled to the service of finding a man to make a mess of grout or dillegrout in the King's kitchen and bring it to the King's table in person. These and similar edifying items are solemnly and with elaborate detail recited by the learned authors, with copious citations of Taylor's "Glory of Regality" and Wollaston's "Coronation Claims."

In make-up and general style the present volumes coincide with their predecessors, closely following in matters of form the pattern set by American legal encyclopædias. Each article is preceded by an analytical synopsis of the contents, as in the American archetype; and along the same line is notable a considerable degree of departure from the classification adopted in English digests. The present work splits up into specific titles the topics of the law to an extent never before found in English classification. For their progressiveness in thus far adopting American ideas of law writing our English cousins are to be congratulated.

News of the Profession.

THE MINNESOTA STATE BAR ASSOCIATION met in Minneapolis on July 14 and 15. An account of the meeting will be given in this column next month.

THATCHER DISBARRED. — On June 26 the Ohio Supreme Court disbarred from practice Charles A. Thatcher, of Toledo, on the ground of unprofessional conduct.

PENNSYLVANIA JUDGE DIES. — Hon. Christopher Magee, former judge of the Court of Common Pleas of Allegheny county, Pa., died suddenly at Pittsburg on July 3.

APPOINTED FEDERAL JUDGE FOR ALASKA. — On June 11 the President sent to the Senate the nomination of Peter D. Overfield to be United States judge for the third division of Alaska in place of Judge Thomas H. Reid, resigned.

JUDGE FIELD, OF KENTUCKY, DEAD. — Hon. Emmet Field, one of the ablest and most esteemed members of the Kentucky judiciary, died in Louisville on June 21 at the age of sixty-eight. He had served on the common pleas bench of the Jefferson Circuit Court since 1886.

APPOINTED MAGISTRATE FOR BROOKLYN. — Mr. Howard P. Nash, well known to the profession as a legal editor, has recently been appointed by Mayor McClellan to be police magistrate of Flatbush, Brooklyn, in succession to Magistrate Steers. Mr. Nash is a graduate of Harvard, and is a lawyer of much ability. For a number of years he was connected with the Edward Thompson Company.

DEATH OF WELL-KNOWN PATENT LAWYER. — Thomas W. Bakewell, of Plainfield, N. J., a widely known patent attorney with offices in Pittsburg and New York, died suddenly in Pittsburg on July 7 at the age of fifty-five. He had just finished an argument in the United States Circuit Court before Judge Buffington when he was attacked by acute indigestion and died before medical aid could reach him.

NEW CANADIAN JUDGES. — E. G. S. Huycke, K. C., of Cobourg, has been appointed county judge at Peterborough, in succession to the late Judge Weller, and W. A. D. Lees, K. C., of Fort Saskatchewan, has been appointed judge for the Battleford District, Sask.

TO ORGANIZE BAR ASSOCIATION IN CALIFORNIA. — Judge Curtis H. Lindley, president of the San Francisco Bar Association, has set on foot a movement to organize a State association. The matter has been taken up by lawyers all over the State, and a meeting of representative attorneys is to be held shortly in San Francisco for the purpose of organizing.

THE AMERICAN BAR ASSOCIATION will hold its annual meeting in Detroit on August 24 to 27. The annual address will be delivered by Gov. Augustus E. Willson, of Kentucky. Among the foreign guests who will participate in the proceedings are Sir Frederick Pollock, the eminent English text-writer, and M. Gorges Barbey, a distinguished Parisian advocate. The latter will read a paper on "French Family Law."

BAR MEETINGS IN AUGUST. — The annual meeting of the Virginia State Bar Association will be held at Hot Springs on August 10, 11, and 12, with James M. Beck, of New York city, as the principal speaker. The Wisconsin Association will hold its convention in Milwaukee on August 24 and 25. The Michigan lawyers will meet in Detroit on August 24 to 28, at the time the meeting of the American Bar Association is held there.

A BLOW TO PARISIAN LADY LAWYERS. — The Bar Council in Paris has recently issued a regulation by which advocates are forbidden to allow their photographs to be published in newspapers and magazines. It is said to have been founded on the anxiety of the feminine members of the bar to see their features in the public prints, whereby they obtained an undue amount of advertising to the great loss and detriment of their masculine rivals.

PENNSYLVANIA'S FIRST WOMAN LAWYER DEAD. — Mrs. Carrie Burnham Kilgore, the first woman to be admitted to the Pennsylvania bar, died on June 29 at her home in Swarthmore, near Philadelphia. She was graduated from the University of Pennsylvania law school in 1883, and after a determined struggle against that disheartening obstacle, lack of precedent, finally secured recognition from all the courts of Pennsylvania and the United States Supreme Court as well.

DEATH OF JOHN GOODE, OF VIRGINIA. — John Goode, eminent as lawyer, statesman, and soldier, died at his home in Norfolk, Va., on July 14, at the advanced age of eighty years. Mr. Goode became a member of the Virginia legislature at the age of twenty-one. He was a member of the secession convention, and throughout the Civil War he served with distinction on the staff of General Early. Subsequently he was three times elected to Congress, and was nominated for solicitor-general of the United States by President Cleveland, but his confirmation was defeated by the opposition of Senator Mahone. Mr. Goode was one of the ablest lawyers that Virginia has produced.

NORTH CAROLINA STATE BAR ASSOCIATION. — The eleventh annual meeting of the North Carolina State Bar Association was held in Asheville on June 30 and July 1 and 2. The visitors were welcomed by Julius C. Martin, of Asheville, the response being made by A. B. Andrews, Jr., of Raleigh, after which President Louis H. Clements, of Salisbury, delivered his address. The annual address was delivered by James W. Osborne, of New York city, whose subject was "Reminiscences of the New York Bar." Among the papers read were "The Progress of the Law," by E. F. Oydlett, of Elizabeth City, and "The Life and Character of Lord Coke." Thomas Settle, of Asheville, spoke on the duty of the legal profession in the rebuilding of the South. Col. John W. Hinsdale, of Raleigh, was elected president for the next term, and Thomas W. Davis, of Wilmington, was re-elected secretary and treasurer.

ARKANSAS STATE BAR ASSOCIATION. — The twelfth annual meeting of the Bar Association of Arkansas was held at Hot Springs, Ark., June 1 and 2. The programme was as follows: Annual address by the president, Mr. J. M. Moore, Little Rock, on "The Development of the Law of Private Corporations;" address by Judge U. M. Rose, Little Rock, on "Life and Character of Chester Ashley;" paper by C. B. Moore, Texarkana, on "The Oath: Its History, Use, and Abuses;" paper by S. H. Mann, Forrest City, on "Special Legislation;" paper by Mr. Cummins Ratcliffe, Little Rock, on "Mining Law;" paper by Mr. John W. Stayton, Newport, on "Baseball Jurisprudence." The association adopted the American Bar Association code of ethics. The following officers were elected: President, N. W. Norton, Forrest City; vice-president, W. V. Tompkins, Prescott; treasurer, P. C. Dooley, Little Rock; secretary, R. R. Lynn, Little Rock. [Reported by Mr. R. R. Lynn, secretary of the association.]

OHIO STATE BAR ASSOCIATION. — The thirtieth annual meeting of the Ohio State Bar Association was held at Put-in-Bay on July 6, 7, and 8. Two disappointments were met with at the outset in announcements that neither Governor Harmon, who was on the programme for an address, nor Congressman Samuel L. Walker, of Massachusetts, who was to have delivered the annual address, would be able to attend. Among the papers and addresses were "Employers' Liability and Compensation Laws," by James R. Garfield, of Cleveland, former Secretary of the Interior, and "Uniform Marriage and Divorce Laws," by Walter G. Smith, of Philadelphia. Owing to illness Thomas Beer, of Bucyrus, was unable to attend, and his paper on "Coke Literature" was read by Smith W. Bennett. The following officers were elected: President, Judge J. B. Burrows, of Painesville; secretary, E. B. Carter, of Columbus; treasurer, C. E. Gilmore, of Dayton.

INDIANA STATE BAR ASSOCIATION. — The thirteenth annual meeting of the Indiana State Bar Association was held in Indianapolis on July 7 and 8. President Daniel W. Simms, of Lafayette, opened the meeting with an address on "The Law and the Lawyer." The annual address was delivered by Hon. Alexander Humphrey, of Louisville, Ky., who took for his theme, "The Last Year with the United States Supreme Court."

Other papers read during the meeting were "Indiana Courts," by Hon. James S. Dodge, of Elkhart; "Modern Views of Compensation for Personal Injuries," by Hon. Addison C. Harris, of Indianapolis; "The Trouble with the Law," by Hon. William Dudley Faulke, of Richmond; "The State Bar Association of Indiana," by Hon. Emory B. Sellers, of Monticello; "Lawyers and Courts," by Hon. Cassius C. Hadley, of Indianapolis. The meeting was concluded with the usual banquet. The following were elected officers for the ensuing year: President, John T. Dye, of Indianapolis; vice-president, E. G. Hogate, of Bloomington; secretary, George H. Batchelor, of Indianapolis; treasurer, Frank E. Gavin, of Indianapolis.

WEST VIRGINIA STATE BAR ASSOCIATION. — The twenty-fifth annual meeting of the West Virginia State Bar Association was held at Webster Springs on July 7 and 8. The meeting was opened by the address of the president, C. W. Campbell, of Huntington, who discussed the statutes relative to acknowledgments and the recording of deeds. A paper on "Primary Election Laws" was read by Hon. Harvey W. Harmer, of Clarksburg, and Judge Hunter Moss, of Parkersburg, read one entitled "The Playground of Divorce." The principal address was delivered by Judge Henry Brannon, of Weston, on "The Supreme Court of Appeals of West Virginia." The following officers were chosen: President, W. E. Haymond, of Sutton; vice-presidents, A. L. Lehman, of Fairmont; E. D. Talbott, of Elkins; Charles S. Dice, of Lewisburg; J. T. Cooper, of Parkersburg, and Wyndham Stokes, of Welch; secretary, Charles McCamie, of Wheeling; treasurer, Charles A. Kreps, of Parkersburg. The meeting next summer will be held at White Sulphur Springs.

ALABAMA STATE BAR ASSOCIATION. — The thirty-second annual meeting of the Alabama State Bar Association was held in Birmingham on July 8 and 9. President W. S. Thorington presided and opened the meeting with an address. The annual address was delivered by William L. Curtis, of New York, on the subject, "The Truth About the Panama Canal." The fact that Mr. Curtis is a partner of William Nelson Cromwell lent additional interest to his address. The papers on the programme were as follows: "The Ideal Trial Judge," by W. O. Mulkey; "The Majesty of the Law," by S. L. Field; "Buying a Piece of Land," by E. W. Faith; "Common Law Marriage," by R. C. Brickell; "Quadrennial Sessions of the Legislature," by Emmett O'Neal. The usual banquet, over which James Weatherly presided, brought the meeting to an end. Mobile was selected as the place for next summer's meeting. Emmett O'Neal, of Florence, was elected president for the next term, and the new vice-presidents are John T. London, of Birmingham; W. M. Lackey, of Dadeville; McLane Tilton, of Pell City; E. W. Faith, of Mobile, and D. W. Partridge, of Selma.

IOWA STATE BAR ASSOCIATION. — The fifteenth annual meeting of the Iowa State Bar Association was held in Marshalltown on June 24 and 25. An address of welcome by Judge J. M. Parker was responded to by Hazen I. Sawyer, after which the president, Judge J. W. Bollinger, of Davenport, delivered his address. The annual address was delivered by John H. Wigmore, dean of the Northwestern University law school, whose subject was "Rules of Evidence in Criminal Cases." A paper on "Tendencies in Legal Education" was read by Prof. H. Claude Horack, of the Iowa University law school. The association adopted the code of ethics recommended by the American Bar Association. Among the speakers at the annual banquet were Gov. B. F. Carroll, Judge W. D. Evans, of the Iowa Supreme Court, and W. S. Kenyon, of Chicago. The officers elected for the ensuing term were as follows: President, C. M. Harl, of Council Bluffs; vice-president, J. L. Carney, of Marshalltown; secretary, C. M. Dutcher, of Iowa City; treasurer, Charles S. Wilcox, of Des Moines. The meeting next year will be held at Des Moines.

NEW JERSEY STATE BAR ASSOCIATION. — The eleventh annual meeting of the New Jersey State Bar Association was held at Atlantic City on June 11 and 12, with President Clarence L. Cole, of Atlantic City, in the chair. At the outset of the meeting a spirited contest arose over the proposed constitutional amendments changing the judicial system of the State, which resulted in the appointment of a committee charged with the duty of making the public acquainted with the purposes of the amendments before the special election in September. At the banquet held on the evening of the 11th Governor Fort was the principal speaker, devoting his time to a discussion of the proposed amendments. The notable feature of the second day was an address by Hon. David J. Brewer of the United States Supreme Court on "America's Part in the Establishment of Universal Peace." The following officers were elected: President, Samuel Kalish, of Newark; vice-presidents, ex-Judge Howard Carrow, of Camden; William M. Johnson, of Hackensack, and William I. Lewis, of Paterson; treasurer, Judge Lewis Starr, of Woodbury; secretary, William J. Kraft, of Camden.

ILLINOIS STATE BAR ASSOCIATION. — The thirty-third annual meeting of the Illinois State Bar Association was held in Peoria on June 24 and 25. President E. P. Williams, of Galesburg, opened the meeting, but, owing to his indisposition, was unable to deliver his address, which was read by his law partner, J. D. Welch, of Galesburg. Hiram T. Gilbert, of Chicago, read a paper on "The Administration of Justice in Illinois," wherein he discussed the proposed changes in procedure contained in his bill now pending before the legislature. The annual address was delivered by Oliver H. Dean, of Kansas City, Mo., whose subject was "The Making of the Constitution." Floyd R. Mechem, of Chicago, read a paper on "Employers' Liability." Considerable excitement was developed during the meeting over the method of selecting officers for the association, and a band of insurgents made a bold effort to elect a ticket of their own. However, the "regular" slate was eventually elected as follows: President, Edgar A. Bancroft, of Chicago; vice-presidents, William R. Curran, of Pekin; Samuel Alschuler, of Chicago, and Nathan William McChesney, of Chicago; secretary and treasurer, John F. Voight, of Mattoon. The meeting was closed with a banquet at the Creve Coeur Club, Edward C. Kranier, of East St. Louis, acting as toastmaster in the absence of retiring President Williams. The place decided on for next year's meeting was the Chicago Beach Hotel.

TENNESSEE STATE BAR ASSOCIATION. — The twenty-eighth annual meeting of the Tennessee State Bar Association was held in Chattanooga on June 23, 24, and 25. After a welcoming address by J. M. Trimble, of the Chattanooga bar, had been responded to on behalf of the visitors by Col. W. A. Henderson, President Foster V. Brown delivered his address. The following papers were read: "The Life, Character, and Public Services of Col. A. S. Colyar," by Judge Floyd Estill, of Winchester; "Bankruptcy Law: Its History and Purpose," by H. M. Shelton, of Bristol; "Random Observations on the Police Power," by Chancellor D. L. Lansden, of Cookeville. The principal features of the second day were a paper on "Judges John Baxter and D. M. Key," by Judge Lewis, and one on "Trial by Jury," by Judge E. C. O'Rear, of Kentucky. In the afternoon the members of the association went for a boat ride down the Tennessee river. The principal address was delivered on the final day by Col. W. A. Henderson, of Washington, D. C., whose subject was "The High Art of Cross-examination." Other papers were: "The Organization of the Federal Courts, Historically Considered," by Judge Edward T.

Sandford, of Knoxville; "The Life and Character of Judge William F. Cooper," by Hon. John Bell Keeble, of Nashville. The annual banquet was held at the Hotel Patten, Hon. Jesse M. Littleton, of Winchester, acting as toastmaster. The officers elected for the ensuing term were as follows: President, Harry B. Anderson, of Memphis; vice-presidents, L. D. Smith, of Knoxville; Percy D. Maddin, of Nashville; Judge A. B. Lamb, of Paris; secretary and treasurer, Charles H. Smith, of Knoxville.

KENTUCKY STATE BAR ASSOCIATION. — The eighth annual meeting of the Kentucky State Bar Association was held in Paducah on July 7 and 8. An address of welcome by Judge Wm. Reed, of Paducah, opened the meeting, after which President John R. Allen, of Lexington, delivered his address. The principal event of the meeting was the address of United States Attorney-General George W. Wickersham, on "State Legislation Regarding Foreign Corporations." Other addresses were "Kentucky's Contribution to Jurisprudence," by Henry Burnett, of Louisville; "The Distinction between Judicial and Legislative Functions," by Hon. John M. Lassing, of Burlington; "The Future of Our Profession," by Montgomery Merritt, of Henderson; "Land Titles in Kentucky," by William Ayres, of Pineville; "Where the Law Fails," by Hon. Robert L. Stout, of Versailles. At the annual banquet C. C. Grassham, of Paducah, presided, and toasts were responded to by the following gentlemen: W. P. Kimball, of Lexington; N. P. Taylor, of Henderson; Hal Corbett, of Paducah; E. J. McDermott, of Louisville; James Garnett, of Columbia. Officers for the ensuing term were elected as follows: President, Charles W. Metcalf, of Pineville; secretary, R. A. McDowell, of Louisville; treasurer, John K. Todd, of Shelbyville; vice-presidents, Newton W. Utley, of Eddyville, Clarence W. Finn, of Owensboro, James Garnett, of Columbia, Van B. Norman, of Louisville, D. Gray Falconer, of Lexington, T. P. Carothers, of Newport, and H. H. Tye, of Williamsburg.

PENNSYLVANIA STATE BAR ASSOCIATION. — The fifteenth annual meeting of the Pennsylvania State Bar Association was held at the Bedford Springs Hotel on June 30, 31, and July 1. The president, Attorney-General M. Hampton Todd, opened the meeting with an address in which he reviewed the important legislation for the year, which was followed by committee reports and other routine business. In the evening the annual address was delivered by Amasa M. Eaton, of Providence, R. I., whose subject was "Thomas W. Dorr and the Dorr War in Rhode Island." The second day was for the most part devoted to discussion of committee reports, but in the evening two papers were read, "Comparative Law as a Practical Science," by William W. Smithers, of Philadelphia, and "Gibson and a Progressive Jurisprudence," by John W. Appel, of Lancaster. On the third day papers were read on "Full Paid and Nonassessable," by Owen J. Roberts, of Philadelphia, and "A Judicial Solecism," by A. J. W. Hutton, of Chambersburg. The meeting was closed with the annual banquet, at which the retiring president acted as toastmaster. Responses were made by Lieutenant-Governor Robert S. Murphy, of Johnstown, ex-Governor Samuel W. Pennypacker, Amasa M. Eaton, of Providence, R. I., W. Russell Carr, of Uniontown, and George S. Schmidt, of York. The officers elected for the ensuing term were as follows: President, Judge Gustave A. Endlich, of Berks county; vice-presidents, W. L. Dalzell, of Allegheny, D. Watson Rour, of Franklin, Russell C. Stewart, of Northampton, Charles M. Clement, of Northumberland, and John I. Rogers, of Philadelphia; secretary, Judge William H. Staake, of Philadelphia; treasurer, William Penn Lloyd, of Cumberland.

MARYLAND STATE BAR ASSOCIATION. — The fourteenth annual meeting of the Maryland State Bar Association, which was held at Old Point Comfort, Va., on July 7, 8, and 9, was in some respects the most notable in the history of the organization. The address by Hon. Henry B. Brown, ex-justice of the United States Supreme Court, on "The Law and Procedure in Divorce," has probably attracted more widespread attention than any utterance before a State bar association in many years. There were also a number of other interesting addresses, as follows: "Do the Incorporation Laws Allow Sufficient Freedom to Commercial Enterprise?" by Arthur W. Machen, Jr., of Baltimore; "The Sherman Anti-trust Act and Industrial Combinations," by Herbert Noble, of New York; "The Election of United States Senators," by Albert A. Daub, of Cumberland; "The New Reading of the Due Process of Law," by Hon. Simeon E. Baldwin, Chief Justice of the Connecticut Supreme Court; "Some Late Workings of the Doctrine of Public Policy," by W. Irvine Cross, of Baltimore; "Law in Books and Law in Action," by Roscoe Pound, dean of the Northwestern University law school; "Some Duties of the Whole Profession," by Carroll T. Bond, of Baltimore. The address of the president, William C. Devecmon, of Cumberland, was also of great, if largely local, interest. The meeting closed with a banquet at which William L. Marbury officiated as toastmaster. Next year's meeting will be held at the same place, in conjunction with the Virginia association. The officers elected were as follows: President, David G. McIntosh, of Baltimore; vice-presidents, Joshua W. Miles, Joseph B. Seth, George L. Van Bibber, J. Augustin Mason, James M. Monroe, Glenn H. Worthington, Fillmore Beall, Alexander H. Robertson, and Thomas F. Hisky; secretary, James W. Chapman, Jr., of Baltimore; treasurer, R. Bennett Darnall, of Baltimore.

English Notes.

ANOTHER WITTICISM FROM MR. JUSTICE DARLING. — Mr. Justice Darling surely is a jokey old party. In a case recently before him which involved a piece of machinery, counsel was explaining that a certain valve worked with a spring. "But your lordship knows," he said, "that a spring will not last forever." "Yes," replied Mr. Justice Darling, "I have read somewhere, *Ver non semper vivet.*"

AN ADMIRABLE PRECEDENT. — At last the sufferers from piano playing are beginning to obtain their rights. In the case of Owen *v.* Jackson (noted in the *Law Journal* for June 19, at page 388), which was recently tried at the Llandudno County Court, Judge Sir G. Sherston Baker granted an injunction restraining the defendant from playing on a piano so as to cause a nuisance to the plaintiff. The defendant, who was described as "a capable amateur musician," had a Steinway grand piano on which he played "high-class music" daily to the great annoyance of the plaintiff who lived next door. It was shown that he never played before 10 A. M., or after 10 P. M., and that he averaged two hours and nine minutes a day with a maximum on one occasion of four hours and five minutes. The defendant showed that his piano was the smallest variety of grand piano manufactured by Messrs. Steinway, that he always played with the lid down, and that after complaint was made he placed the piano on carpet with felt under it. But his honor decided that the defendant was a nuisance and ordered him abated.

PRAYING A TALES. — As illustrating the way legal terms fall out of use, the English law journals are narrating an incident which happened in one of the courts not long since. A complication having arisen the learned judge remarked to the eminent barrister on one side, "Mr. Dash, there is only one thing

for you to do. You must pray a tales." "What's that?" hurriedly inquired Mr. Dash of his opponent, Mr. Blank. "I don't know," answered Mr. Blank. "Then we had better settle the case," said Mr. Dash. And the case was settled forthwith. Admirers of the immortal Serjeant Buzfuz may remember that he prayed a tales, and the chemist was thereupon impaneled. For the benefit of such of our readers as may not be familiar with the term, we quote the following from 3 Black. Com. 364: "If by means of challenges or other cause a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a tales. A tales is a supply of such men as are summoned upon the first panel in order to make up the deficiency." See 27 Am. & Eng. Enc. of Law (2d ed.) 566.

EMPLOYER'S LIABILITY FOR INJURIES BY ANIMALS. — A couple of rather curious cases have come up recently under the Workmen's Compensation Act regarding the employer's liability for injuries to employees by animals. In Rowland *v.* Wright, (1909) L. R. 1 K. B. 963, the plaintiff was employed in a stable, and while he was eating his dinner, a cat which made its abode in the stable sprang upon him without provocation and bit him, causing blood-poisoning and the ultimate loss of a finger. The Court of Appeal upheld an award of damages on the ground that the injury arose out of and in the course of the employment. Cozens-Hardy, M. R., remarked in the course of his opinion: "Part of what may be called the necessary furniture of a stable is a stable cat."

In Craske *v.* Wigan (noted in the *Law Journal* for June 12, at page 371), the plaintiff, who was a lady's maid, applied for damages on the ground that while she was sitting at an open window sewing, a cockchafer flew in, and in raising her hand to protect her face she stuck her thumb into her eye, injurying the eye seriously and permanently. But the court drew a distinction between animals, such as a cat, which form part of the furniture of the place where the workman's employment has taken him, and a mere wandering trespasser of a cockchafer, and the lady's maid got no damages for her wounded eye.

Obiter Dicta.

INEXPERIENCE. — "No man can have two wives at the same time." McAdam, J., in Blinks *v.* Blinks, 5 Misc. (N. Y.) 193.

HARDLY CREDIBLE. — It is said that a month or so ago the town of Garfield, Wash., a place with a population of some fifteen hundred, was forced to advertise for a lawyer to come there and locate. If this be true — and one cannot but doubt it — the population must be well above the two thousand mark by this time.

QUEER COMPANY FOR LAWYERS. — A correspondent calls attention to the following title of Act No. 239 of the Michigan Public Acts of 1907: "An Act to provide for the lawful taking of suckers, mullet, dog-fish, and lawyers, from the waters of the Sturgeon River in Houghton county, Michigan."

A REVISED MAXIM. — A prominent New York lawyer, charged with obstructing justice by advising a witness to evade service of a subpœna, was recently let off with a small fine because he didn't know that his action was unlawful. Hereafter the old maxim will read *Ignorantia juris neminem excusat, jurisconsultis exceptis.*

A HANDY MAN. — Fred Conwell, justice of the peace in Groveland, combines his legal dispensary with the tonsorial profession, and also carries a large stock of jewelry. His residence of over twelve years in the town inspires confidence in his ability to please in all lines. Added to his other responsibilities is that of notary. — Big Oaks (Iowa) *Enterprise.*

HAD AS MANY LIVES AS A CAT. — In a divorce case recently instituted in the Circuit Court of Baltimore the defendant's sworn answer contains the following paragraph:

"4. Answering paragraph number four of the plaintiff's bill of complaint, this defendant says that he denies that he has treated the plaintiff with great cruelty, harshly, and brutality or that he attempted to take her life, but on the contrary, says the plaintiff on numerous occasions has threatened his life, and on several occasions carried her threats into execution."

A USEFUL BABY. — Speaking of tricks to win the sympathy of juries in criminal cases, Judge Williard M. McEwen, in a recent address before the Illinois State's Attorneys Association, said: "I know of four cases where a baby played a prominent part in getting the acquittal of the defendant, and I later learned that the same baby had been used in each of the cases, although the supposed mothers in each case were different women."

A FLIMSY PRETEXT. — Out in South Bend, Ind., where the plows come from, a lady recently became provoked with her ex-counsel and, unlimbering a large gun, took four shots at him in rapid succession. But so swift and snipe-like was the course of the lawyer's retreat that none of the bullets found lodgment in his person. It is said that the lady's vexation was caused by the lawyer's sending to several of her friends copies of a photograph wherein she appeared garbed after the fashion of Mother Eve, but of course she must have had some more substantial grounds for her dissatisfaction.

EVEN-HANDED JUSTICE. — The administration of justice in Germany is characterized by a pompous accuracy that sometimes produces curious results. In a certain village there is an ordinance requiring all ladders to have a special kind of top piece. Not long ago a burglar, who attempted to effect an entrance into a house by the use of a ladder which he found in the yard, fell from the ladder and broke his leg. On being haled into court he was meted out due and proper punishment, but, as the ladder was found not to be equipped with the required top piece, the owner was required to pay the burglar's hospital expenses and damages for the injury.

A MAN IN TEN THOUSAND. — The following appeared in the "want" column of the *New York Law Journal* for June 19, 1909:

"A composite young man (22), in whom are happily blended the qualifications characteristic of the estate supervisor, realty and mortgage administrator and of the intellectual utility man, desires to study law in law office having a real estate department; possesses an appreciation of legal values; excellent business sense; individual way of doing things; possesses many qualifications peculiarly his own. Harry Ginsburg, 254 Watkins Street, Brooklyn."

PATIENCE NO LONGER A VIRTUE. — Last month London *Law Notes* — which, by the way, is the only legal periodical emanating from England that is not afflicted with a funereal solemnity — borrowed a couple of paragraphs from us, giving due credit, be it said, so we shall return the compliment by lifting this one from their columns, though it would appear to be of

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American origin: "The following notice was posted by an Illinois farmer: 'Notis. — Trespassers will B persekuted to the full extent of 2 mean mungrel dogs which aint never been overly soshibil to strangers and 1 dubbel barl shot gun which aint loaded with soft pillors; dam if I aint gettin tired of this hel-raisin on my farm.'"

RUBBING IT IN. — When one Jose Maria Martin was in the year 1858 convicted of murder in Taos county, N. M., sentence was pronounced upon him by Judge Kirby Benedict as follows: "Jose Maria Martin, stand up. You have been indicted, tried, and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law.

"As a usual thing, Jose Maria Martin, it is a painful duty of the judge of a court of justice to pronounce upon a human being the sentence of death. There is something horrible about it and the mind naturally revolts from the performance of such a duty.

"Happily, however, your case is relieved of all such unpleasant features. The court takes a positive delight in sentencing you to death. You are a young man, Jose Maria Martin, apparently of good constitution and robust health. Ordinarily you might have looked forward to many years of life, and the court has no doubt you have, and expected to die at a green old age, but you are about to be cut off in consequence of your own act. Jose Maria Martin, it is now the spring time. In a little while the grass will be springing up green in these beautiful valleys and these broad mesas and on the mountain sides. Flowers will be blooming, birds will be singing their sweet carols and nature will be putting on her most attractive robes, and life will be pleasant and men will want to stay. But none of this for you, Jose Maria Martin. The flowers will not bloom for you, Jose Maria Martin. The birds will not sing their sweet carols for you, Jose Maria Martin. When these things come to gladden the senses of man, you will occupy a space six by two beneath the sod, and the grass and these beautiful flowers will be green growing about your lowly head.

"The sentence of the court is that you be taken from this place to the county jail. That you be safely kept and securely confined in the custody of the sheriff until the day appointed for your execution.

"Be very careful, Mr. Sheriff, that he have no opportunity to escape, and that you have him at the appointed place, at the appointed time. That you be so kept, Jose Maria Martin, until — Mr. Clerk, upon what day of the month does Friday about two weeks from this time come?" "March 22d, your honor." "Very well, until Friday, the 22d of March, when you will be taken by the sheriff from your place of confinement to some safe and convenient spot within the county, and that you be there hanged by the neck until dead.

"And the court was about to add, Jose Maria Martin, 'may God have mercy on your soul,' but they will not assume the responsibility of asking an All Wise Providence to do that which a jury of your peers have refused to do. The Lord could not have mercy on your soul. However, if you affect any religious belief, or if you are connected with any religious organization, it might be well for you to send for your priest or your minister and get from him, well, such consolation as you can, but the court advises you to place no reliance on anything of that kind.

"Mr. Sheriff, remove the prisoner."

The sequel of the above remarkable sentence is interesting in that Jose Maria Martin "escaped from the county jail" and several years afterwards peacefully met his death in Lincoln county by falling backwards out of a wagon and breaking his neck.

Correspondence.

IN DEFENSE OF THE SUPREME COURT.

To the Editor of LAW NOTES.

SIR: Will you excuse me for entering the solemn protest of an American citizen against the publication by a reputable law journal of the letter, headed "A Blast from Arkansas," written by one P. H. Prince and printed in your July issue, in which he makes a most outrageous and scurrilous attack upon the members of the Supreme Court of the United States, simply because he disagrees with the majority of said court on the constitutionality of the late income tax law?

I do not know whether Mr. Prince is a licensed attorney or not, but I presume that he is, as he is "rushing into print" in the LAW NOTES. He writes like a cross between a socialist and an anarchist, with largely preponderating strains of the latter in his physiological and psychological make up. His very bad grammar indicates lack of education sufficient to entitle him to the privilege of swinging out a law shingle to unsuspecting, would-be clients, and would indicate that he is inviting them to consultations bottomed upon ignorance of the subjects about which they may seek intelligent rational information.

His effrontery in denominating the honorable judges of the Supreme Court of the United States as persons who were "corrupted when they delivered that opinion," is beyond the power of respectful language to describe and is but another of the many exemplifications of the truth of the old adage "that fools rush in where angels fear to tread."

I, as a lawyer, do not agree with the majority opinion of the Supreme Court of the United States, that a tax upon incomes is a direct tax, and, as such, should be apportioned among the several States according to population. I could give my reasons, but it is useless to do so here. All well-informed lawyers know them.

I believe that no American citizen ought to be deprived of the right to make a just and respectful criticism of the action of the Supreme Court or of any other department of this government. But such false and slanderous rot as that embodied in the "Blast from Arkansas" should not be tolerated by the editor of such a journal as LAW NOTES and ought not to be dignified by anything except consignment to the waste basket and the flames.

The Supreme Court of the United States is the great balance wheel in this government and it deserves and possesses the confidence of all self-respecting, liberty-loving, patriotic American citizens.

It ought not to rest with those who make the laws of this country and those who execute those laws to judge as to whether

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or not they are consistent with the Constitution. This has been by the fathers wisely confided to this great independent tribunal. While we may not always concur in its opinions, still it is our duty, as citizens, to give to them respectful consideration. When we discuss them we should do so respectfully, giving sound legal reasons for our dissent, or approval, and not attempt to bring the judges into contempt and disrepute.

The country utterly repudiates the statement of Mr. Prince that these judges are corrupt or corruptible. They may err as other men have erred in the past, and their errors are not made sacred against discussion in a proper manner and at a proper time and place. I have no patience with any man, be he lawyer or layman, who seeks to attribute corrupt motives to the opinions of the great judges of the Supreme Court. I would admit my lack of confidence in this government, if I did not utterly repudiate the suggestion that they, or any one of them, are corrupt. I do not believe it. I am confident there is not a justice on this great bench now, and I do not believe that one ever sat there, whose judgment could be purchased at any price. I do not believe that all the gold in or out of the bowels of the earth and "all the treasures that conquering armies have laid at the feet of their royal masters could tempt the smallest of them to sell his judgment." When I cease to believe this, then will I begin to despair of the republic. I believe that any man who attempts to cast unjust aspersion upon this great tribunal is an enemy of his country and ought to be expatriated as such.

JOE W. TAYLOR.

WACO, TEX.

CRITICISM OF JUDGES RUNNING FOR RE-ELECTION.

To the Editor of LAW NOTES.

SIR: My attention has been called to a communication in LAW NOTES for July, 1909, entitled: "Criticism of Judges Running for Re-election." It appears to be based upon misinformation as to the nature of *In re* Charles A. Thatcher, a disbarment proceeding in the Supreme Court of the State of Ohio. The newspaper reports of the case have been incomplete and misleading. It has not been contended by anybody, nor was it decided by the court, that it is improper to criticise judges who may be candidates for re-election. On the contrary, two of the propositions of the syllabus, as given out by the court, are as follows:

"3. An elector who is an attorney has the right to criticise the judgments and conduct of judges in a decent and respectful manner; but no man has a right to degrade and intimidate a public officer and bring his office into contempt by the publication of libelous matter at any time, and the fact that such officer is a candidate for re-election will not excuse such conduct. One who claims the protection of the Constitution, article I, section 11, must also and at all times be held responsible for abuse of the privilege."

"4. The real question in cases of this kind is whether under the facts admitted and proved the respondent appears to be a fit person to be longer allowed the privilege of an attorney; whether he has shown himself, by lack of appreciation of ethical standards and by unworthy conduct, to be no longer worthy of being recognized as an officer of the courts."

The charges against Mr. Thatcher were: first, that as an attorney at law he had been guilty of unprofessional conduct involving moral turpitude, and second, that he was guilty of misconduct in office. There were eighteen specifications set forth in connection with each of these charges. The specifications were substantially the same under each charge. The court unanimously found the respondent guilty of both the charges, and under all the specifications except Nos. 13, 15, 16, and 18. The first twelve of the specifications relate to certain publications written and distributed by the respondent, which were libelous in their character, and so found to be by the court. They were of an unusually damaging nature, and the respondent failed to satisfy the court of the truth of the material charges and statements contained in those publications. Neither the specifications nor publications circulated by the respondent can well be abridged, and will appear *in extenso* in the official report of the case in volume 80, Ohio State Reports. Specification 17 did not concern the so-called libels

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upon the judges and the courts of Lucas county, but relates to the bringing of an action upon certain promissory notes, which, it was alleged, had been paid and which the respondent as found by the court knew had been paid, and such action was brought in the name of one who was not the real party in interest in the notes, and the respondent knew he was not the real party in interest; and that suit was so brought for the purpose of imposing upon the court and deceiving the defendant in the action; and that the respondent concealed his relation to the case and induced a reputable attorney to bring such action, knowing that the action was fraudulent, and without revealing to such attorney the facts aforesaid. The court found Mr. Thatcher guilty of this specification as well as the others. So that it will be perceived that there was much more involved in this case than the question spoken of in the communication in LAW NOTES.

The item, gathered from the newspapers, that Senator Foraker was retained to appear in the case, was without foundation. Senator Foraker did not appear in the case at any stage of its proceedings, nor was he in any way connected therewith.

Feeling sure that you have no desire to misinform your readers as to the nature and results of the above case, involving as it does a question of great importance, not only to the public but especially to the legal profession, I have taken the liberty to address you concerning the communication appearing in your last issue.

E. O. RANDALL,
COLUMBUS, OHIO. *Supreme Court Reporter of Ohio.*

To the Editor of LAW NOTES.

SIR: In the July number of LAW NOTES F. E. Rosbrook writes concerning criticism of sitting judges who are candidates for re-election, and states that he finds no case where the question has been squarely presented.

If he will turn to the case of State *ex rel. v.* Circuit Court, 97 Wis. 1, he will find the question treated in a contempt proceeding.

MADISON, WIS. J. B. WINSLOW.

THE PLEASURE IS OURS.

To the Editor of LAW NOTES.

SIR: Will you be kind enough to find out and give through the columns of LAW NOTES the name of the author of a book of which the title page is as follows: The Study and Practice of the Law, Considered in Their Various Relations to Society in a Series of Letters. By a Member of Lincoln's Inn. First American Edition. Portland: Printed by Thomas B. Wait and Co. 1806.

The author of this work is more modest than most of the present authors of law books, and has failed to give his name.

The book is dedicated to "The Right Honourable Alexander Lord Loughborough, Lord High Chancellor of Great Britain," and signed, "My Lord, Your Lordship's Most Obedient Servant, The Author." "Grays Inn, April 20, 1798."

I have searched many places for this author's name, but in vain, so if you can give me the desired information I shall, as assistant librarian of the above library [Ohio Supreme Court Law Library], appreciate it very much.

J. W. SHAW.

COLUMBUS, OHIO.

[The book in question was written by John Raithby, Esq., editor of Vernon's English Chancery Reports. It was first published anonymously in London in 1798. A second English edition was published in 1816. — ED. LAW NOTES.]

A WARNING TO THE PROFESSION.

To the Editor of LAW NOTES.

SIR: Another nice new skin-game has made its appearance in the form of an insurance company which gives its home offices in New York and Chicago and writes a fancy letter to the country attorney which reads like a prospect of business of value to the latter in representing the concern in legitimate law business.

After the outfit has obtained sufficient information from the attorney regarding representation by the latter, along comes a bunch of advertising stuff and contracts, the sum and substance of which is an invitation to invest in the stock of the outfit.

Perhaps some of your other readers will be glad of this information before they have wasted time and postage on a concern which ought to be denied the use of the mails.

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Law Notes

SEPTEMBER, 1909.

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The Sixteenth Amendment and the Pollock Case.

THE proposed Sixteenth Amendment giving Congress "power to levy and collect taxes on incomes from whatever source derived, without apportionment among the several States and without regard to any census or enumeration," is meeting with serious opposition. The legislature of one State has rejected the amendment; that of another has postponed its consideration, leaving the responsibility to its successor. A power that was in the unquestioned possession of the United States for a century would hardly seem a power whose exercise by the central government was fraught with grave dangers to the existence of the States. Yet to secure any change in the Constitution, involving an extension of the powers of the general government, the assent of three-fourths of the State legislatures will be gained with the greatest difficulty in the face of the jealousy inherent in our federal system between the States and the United States. When the Constitution was framed it was easier to secure the assent of three-fourths of a comparatively small number of States. But with the extension of statehood to the numerous commonwealths formed from our vast western possessions, the constitutional method of amendment has become increasingly difficult. Only at one period in the history of the country has it been possible to secure any change in the fundamental instrument of government. In the epoch immediately following the civil war, amendments viewed as guaranteeing the results of that titanic struggle were secured through the reconstructed Southern States. It is to be hoped that the conditions of that time will never be duplicated.

As an alternative proposition it was proposed to pass another income tax measure that the Supreme Court might have an opportunity of reconsidering the decision of 1895 in the Pollock case. Some of our wisest statesmen thought that such a course would weaken the popular confidence in the court. Senator Root, who declared that in his opinion the weight of the argument was with the dissenting judges in the Pollock case, expressed himself as opposed to such a plan. "What is it," he says, "that we propose to do with the Supreme Court? It is that the Congress of the United States shall deliberately pass, and the President shall sign, and that the legislative and executive departments thus conjointly shall place upon the statute books as a law, a measure which the Supreme Court has declared to be unconstitutional and void. And then, Mr. President, what are we to encounter? A campaign of oratory upon the stump, of editorials in the press, of denunciation and imputation designed to compel that great tribunal to yield to the force of the opinion of the executive and legislative branches. If they yield, what then? Where then would be the confidence of our people in the justice of their judgment? If they refuse to yield, what then? A breach between the two parts of our government, with popular acclaim behind the popular branch, all setting against the independence, the dignity, the respect, the sacredness of that great tribunal."

Our Supreme Court has not adopted the doctrine of the English House of Lords, that a decision once made can never be reversed by the court. We retain the right to examine again a question once determined, and to reverse the holding if deemed incorrect. In other words, our court does not claim for itself, even in a practical view, the possession of infallibility. In Senator Root's view, however, the co-ordinate branches of the government must treat a decision of the court with a respect which the court itself does not accord to its rulings. So long, of course, as a decision is unreversed it is the law, and every good citizen will treat it as the law; but this does not demand that there shall be no sane and respectful criticism of the decision, nor that the court shall not be given an opportunity to re-examine its own reasoning.

Any decision of the House of Lords can be set aside by an act of the "omnipotent" Parliament, but a constitutional decision of the Supreme Court can only be overruled by the action of Congress, ratified by the separate action of the legislatures of thirty-four States, or by a decision of the tribunal which established the original doctrine. The latter mode of determining the question is to be denied the court out of regard for its influence, and the fact that its great place in the respect and affections of the people may be weakened by demagogic outcry.

National Control of Corporations.

THE corporation tax which was passed by Congress, which seems at first glance so like an income tax as to be obnoxious to the same objections, really stands upon a very different footing. In the decision in the Pollock case Chief Justice Fuller, rendering the opinion of the court, observes: "We have considered the act only in respect of the tax on income derived from real estate and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such." Thus room was left, under the Income Tax case, for a tax on "gains or profits from business, privileges, or employments." Accordingly the Spanish war tax con-

tained a provision taxing refineries of petroleum or of sugar doing a certain amount of business "one-quarter of one per cent. on the gross amount of all receipts" of the companies "in their respective business in excess of" a certain amount. In the Spreckels case, 192 U. S. 397, this tax was held to be a special excise tax, and not a direct one requiring apportionment. The conclusion was said to be "inevitable from the judgments in prior cases, in which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or re-examined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the States according to numbers."

The corporation tax will necessitate federal supervision "over the annual accounts and business transactions of all corporations." But it will not involve any exercise of the powers of the general government under the commerce clause — that power so like the police power of the States — over corporations engaged in interstate commerce. A national incorporation act, which would involve this power, was spoken of in the address of the Attorney-General of the United States to the Kentucky Bar Association on "the inevitable result of economic conditions," and "the ineffectiveness of State legislation." This is an application of ideas once expressed by Mr. Root as the accredited representative of the last administration.

Such a change in the relations of the federal government toward the business of the country and toward the States as well ought not to be undertaken lightly or until "the ineffectiveness of State legislation" has been established past doubt.

Ineffectiveness on the part of the States in controlling corporations and combinations was for a time inevitable, because the industrial conditions to be met were so new and so imperfectly understood. It is highly probable that we are entering upon a period in which, whether for better or worse, effective State statutes may be passed and enforced.

The Manufacture of Undesirable Citizens.

IF we are to believe those earnest gentlemen — irreverently known as "high-brows" — who unselfishly devote themselves to their neighbors' affairs and to the propagation of the doctrine that whatever is is wrong, the manufacture of undesirable citizens is one of the most flourishing industries in this country. They would have us believe that it is quite the usual thing for immigrants to be permitted to land in defiance of the law and for resident aliens to be admitted to citizenship in spite of the fact that they are obviously not qualified. Of course it is utterly useless to attempt to convince these pessimists that the immigration and the naturalization laws are honestly administered. Your professional reformer never permits a little thing like evidence to deprive him of the melancholy pleasure of thinking ill of his fellow men.

But it may be well for us meaner mortals to hearten ourselves every now and then by peeping behind the cloud and taking a look at its lining. The Supreme Court of Illinois has recently held that a person who is confessedly an habitual law-breaker is not a person "of good moral character" within the meaning of the naturalization statutes, and therefore is not entitled to be admitted to citizenship. The Naturalization Act of June 29, 1906, c. 3592 (Fed. Stat. Annot., Supp. 1907, p. 231) requires that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, . . . and that during such time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." In *U. S.* v. *Hrasky,* (Ill. 1909) 88 N. E. 1031, it was held that under this statute an alien who is a saloon keeper, and has known for over two years that the State law requires the closing of saloons on Sunday, but has kept the back door of his saloon open on Sunday regularly, and who states that if he should take an oath to support the United States Constitution and laws he would continue to keep the back door of his saloon open on Sundays, should be denied citizenship, as the word "character," although frequently used as synonymous with "reputation," is what a person is, while reputation is what he is supposed to be, and one who is an habitual violator of the laws is not a person of good moral character and well disposed to the good order of the country. In the course of its opinion the court said:

"Whether an applicant should be naturalized who has committed only a single offense of the nature of the one here charged is not in this case, and need not be decided. Neither is the question as to whether an applicant should be naturalized who has formerly been a habitual violator of the law, but admits his wrongdoing, and for years has been observing the law. Both these hypothetical cases are very different from the one now before us. Can a man be said to be 'well disposed to the good order' of his country when he has knowingly, wilfully, and habitually violated the laws of the State in which he resides, and intends to continue doing the same if he is naturalized? The question answers itself. While it is true that this is a 'government of the people, by the people, for the people,' it is just as true that it is 'a government of laws, and not of men.' It is essential to the safety and perpetuity of government that laws should be observed and enforced until repealed. The decision as to the wisdom of the Sunday closing statute rests with the legislature, and not with the courts. As long as it is the law it should be observed. The courts should not be, and as a rule are not, charged with executive or legislative functions, but they are charged with the responsibility of deciding, when the question is properly presented, that a law is in force even if it is not observed by all citizens, or enforced by all public authorities. . . . Applying these principles of law, it is our duty to hold that a person has not behaved as a man of good moral character, and well disposed to the good order of this country, if he has habitually, knowingly, and wilfully violated the Sunday closing law. The petitioner in this case had not only done this for three years immediately preceding his application, but he stated that he intended, if he were naturalized, to continue to violate the law. His application to be naturalized should have been denied."

It would seem that the refreshing candor of the would-be citizen was his undoing. His loss is our gain, however. We shudder to think of what the consequences would be if

we were to permit our home-grown variety of undesirable citizens to be brought into unrestricted competition with the imported article. In any event, the disappointed alien has small ground for complaint, as by his own statement he has for years enjoyed one of the most cherished of the rights of a free-born American — that of habitually disregarding an inconvenient law.

Up-to-Date Police Methods.

THE daily papers have rather hardened us to some of the unconventional methods used by the progressive police of our great cities in getting evidence against suspected criminals. It is by no means uncommon to read of a "plain-clothes man" having been furnished with the wherewithal to gamble, or of marked money having been passed to a bribe-taker within the view of concealed detectives. It is rather surprising, though, to learn that the activities of the police include the furnishing of public moneys to young officers in order that they may spend them on or in the presence of strumpets and thereby obtain evidence that a place suspected of being a disorderly house is in fact so. That this practice obtains, in the city of New York at least, is shown by an opinion delivered by Mr. Justice Crane of the New York Supreme Court, Second Department, in a proceeding to revoke the liquor license of a so-called "Raines Law" hotel. In the course of the opinion, which is reported in the *New York Law Journal* of Aug. 12, 1909, at page 1835, Justice Crane said:

"While I am obliged to grant this application to revoke the above numbered liquor license, the testimony discloses a method and practice of obtaining evidence against disorderly places which cannot pass without my condemnation. Young, unmarried officers in citizen's clothes are sent to suspected saloons or hotels to associate and drink with dissolute female characters, and after having had rounds of drinks are expected to and do take such females to upper rooms for apparently illicit purposes. After the woman, alone in a room with the officer, has exposed her person for hire, the officer leaves, having in this manner obtained the necessary evidence against the house. The city's money is spent for these drinks and doings. One of the officers in giving testimony in this case said he had spent thirty dollars, but that it was nothing compared with what many such evenings cost. But even if the money expense runs into the hundreds of dollars, which the taxpayers are thus giving for this liquidized evidence, it is small indeed compared with the cost to those young officers themselves. In every case it seems that nine or ten policemen are necessary to go through this performance for each place. Of course this work is not of their choosing, but human nature is such that no doubt such occupation is much more tempting than patrolling the streets of Flatbush at night. If the city of New York provides the young men just joining the force with money to visit dives in citizens' clothes and drink and associate with the obscene speaking and behaving occupants, and orders them to take strumpets to private rooms to view the exposure of their persons, it cannot expect these officers to have a very keen sense of honor or a high regard for the manliness of their calling. Such work is revolting and should not be countenanced for a moment, much less compelled. A policeman may be obliged to do many disagreeable things, but he is human and should not be subjected to such temptations or debasing influences, and I am confident this community does not demand nor expect it. To close a disorderly house we have not got to degrade young men. It is said that the evidence can be procured in no other way. In this I must differ, for such places have frequently been closed either upon testimony of occupants or else upon what can be seen going on daily. One does not have to take poison to discover its deadly effects. I trust this word of warning from me will stop such practices."

It would perhaps be rash to say that this is the last word in police enterprise, as we may hear next of a goodly sky-scraper being sacrificed (at the public expense) to entrap a suspected pyromaniac, or of an unselfish policeman offering up his life in an attempt to discover the lengths to which a man of homicidal tendencies will go to gratify his whim.

Judge Crane suggests that human nature is so frail that young and unmarried policemen may be tempted to seek a detail along the primrose path in preference to one requiring them to patrol the inhospitable streets. Some years ago a well-known divine of New York city excused his participation in a frolicsome game of leap-frog with harlots on the ground that he was seeking evidence against the house of which the females were inmates. At a somewhat later period a public official, who was found in a pool-room during a raid thereof, said he was there solely for the purpose of looking for his wayward son. These experiences suggest that a policeman, whenever surprised in a disorderly house, may unblushingly set up the defense that he is acting in the line of his duty. A pretty state of affairs truly.

Free Schools for Paupers.

IT is, of course, a well-settled rule that no tuition fees are required for instruction in the public schools. 25 Am. and Eng. Encyc. of Law (2d ed.) 24. This rule, however, ordinarily applies only to the instruction of children living within the district wherein the school is located. And it is probably true that the statutes or rules regulating the schools of a given district may properly provide that tuition fees may be required of pupils from without the district. It has been held that "where a child of school age is sent, or goes, into a certain school district with the primary purpose of securing a home with a particular family, then he is entitled to the benefits of the public school of the district free of charge. *State* v. *Thayer,* 74 Wis. 48–59, 41 N. W. 1014. But if the primary purpose of the locating in such district is to participate in the advantages which the public schools therein afford, then he must pay tuition, even though there be some other incidental purpose to be subserved while so attending school therein." *State* v. *Board of Education,* 96 Wis. 95, 71 N. W. 123. The foregoing decisions, however, do not touch upon the interesting question whether there can be discrimination, as to making a charge for tuition, between different classes of nonresident pupils. This question was recently passed upon by the Supreme Court of Illinois, in *People* v. *Moore,* 68 N. E. 979, wherein it was held that a statute (Ill. Laws of 1907, page 533) providing free high-school privileges to graduates of the eighth grade, and requiring payment of the tuition from the funds of the district of the pupil's residence only in case the parents were unable to pay tuition, was

unconstitutional as violating the provision of the Illinois constitution (article 8, section 1), requiring the establishment of a free school system for the benefit of all the children in the State. In deciding this question the court said:

"It is, however, insisted that the transfer of pupils from a district not maintaining a high school to the high school of a district which does maintain one is governed by the act approved May 25, 1907 (Laws 1907, page 523), entitled 'An act to provide free high school privileges for graduates of the eighth grade.' That act provides for the payment of tuition from the funds of the district of the pupil's residence only in cases where the parent or guardian of such pupil is unable to pay tuition. The terms and conditions upon which the transfer of pupils from one district to another shall be permitted are matters for the determination of the legislature. It may, if it sees fit, make different terms or conditions where the transfer is to the department of the common school known as the high school, from those required where the transfer is to the grades lower than the high school. In making such terms and conditions, however, the same privileges must in all cases be extended equally to all children under the same circumstances. The constitutional requirement for the provision of a system of free schools is not only a mandate of the legislature, but also a limitation of its power. It can only authorize the establishment of high schools of the character of free schools whereby all the children of the State may receive a good common school education. The high school, as well as the lower grades, must be open to all children in the district of school age free, so that all shall have the right to an equal education therein. If this right is extended to the children of other districts it must be upon the same terms to all similarly situated. It cannot be extended to different individuals at different prices, according to their ability to pay. If open to nonresidents the terms must be equal to all. Since the act in question, in providing for the transfer of pupils to the high school, authorized the payment of their tuition only when their parents or guardians were unable to pay tuition, it is obnoxious to section 1 of article 8 of the constitution of the State, under which the system of free schools required to be established must be for the benefit of all the children of the State."

This decision would seem to be unquestionably correct, as, if the public school facilities of one district are to be afforded to pupils of another district, all of the pupils in such other district should be placed on exactly the same footing. Even if the statute were constitutional it is difficult to see how it could be administered according to its terms. In what manner could the ability of parents to pay tuition be ascertained? Would the test be to give free tuition to the children of persons who are known paupers, or have become a public charge, and to make a charge for the tuition of the children of all other persons? This would seem to be an absurd way of determining the ability of a parent to pay tuition, yet it is difficult to see how any more sensible test could be applied.

The Man and Brother and Ambulance-chasers.

EVER since the "man and brother" has realized that the strong arm of the federal government is at his service for the protection of his rights and punishment of his oppressors he has become very "touchy" as to his rights, and has taken great delight in invoking the services of his protector under all conceivable circumstances. So insistent has he become, indeed, that the government has found it necessary to ignore some of his claims for redress. An instance of this state of affairs is afforded by the recent case of *Brawner* v. *Irvin,* 169 Fed. 964, decided by the United States Circuit Court for the Northern District of Georgia. In that case it appeared that Lula Brawner, colored, brought an action against W. H. Irvin to recover damages from the defendant, who was chief of police of the city of Elberton, Ga., for having called the plaintiff "from her house into her yard, arrested her, and then and there maliciously and cruelly assaulted and beat her with a whip, cutting her flesh in scars, causing her much pain and suffering, all without fault on her part, and without any just cause or provocation."

The plaintiff based her action upon U. S. Rev. Stat., section 5510, 1 Fed. Stat. Annot. 804, which reads as follows:

"Every person who, under color of law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished," etc.

She also relied upon U. S. Rev. Stat., section 1979, 1 Fed. Stat. Annot. 795, which is as follows:

"Every person who, under cover of any statute, ordinance, regulation, custom, or usage or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The court, however, held that federal courts had no jurisdiction of an action for damages by a citizen of African descent against an Anglo-Saxon citizen of the same State for an alleged unlawful assault, committed under cover of executive authority, saying:

"The whole matter resolves itself, therefore, into this: A person of African descent has no more rights than a person of Anglo-Saxon descent. All are citizens, and persons of African descent . . . take their chances with other citizens in the States where they make their home, so that the rights, privileges, and immunities referred to in section 1979 are nothing peculiar to persons of African descent, but are common to all citizens."

This decision would seem to be unquestionably correct; and perhaps there is no moral to be drawn from it other than that there would soon be an end to such frivolous actions were it not for the pernicious activity of ambulance-chasers. It is, of course, highly desirable that our colored citizens be protected in their rights, but there is no reason why a negro, simply because he happens to be black, should be allowed to invoke federal statutes to redress a simple assault committed by another citizen of the same State.

"DECISIONS resting upon a supposed convenience, or principles accommodated to the circumstances, generally form bad precedents." Grier, J. *Stacy* v. *Thrasher,* 6 How. (U. S.) 61.

Technicalities and the Law.

IN the course of some recent remarks Mr. Justice Brewer observed: "Much criticism is made to-day of the courts, their delays and cost of liquidation. No judge ought to object to any honest and fair criticism. It is undoubtedly true that there is a cumbersomeness in our legal procedure which has resulted in great delays, much expense, and sometimes injustice, and there is no duty more imperative upon the bar and the bench than to do what they can to simplify matters and put technicalities out of the way and see to it that substantial justice is administered. No one appreciates this any more fully than do the judges of our higher courts, and yet it must be confessed that some of them are responsible for not a little of the delay."

Further he declared: "The reversing of a judgment by an appellate court on the ground of a mere technicality, when substantial justice has been administered, is an outrage."

These remarks, especially the last quoted, probably convey a meaning which the justice did not intend. An appellate judge finding a line of precedents in which technicalities have been regarded may feel it his sworn duty to regard technicalities in like cases. Again, what is a technicality depends on the point of view, and may be differently decided by different individuals. The tendency everywhere in this country is to make a fetish of the jury trial, and a reverential regard for the sacrosanct character of that great bulwark of liberty may and frequently does lead to practical injustice and the weakening of respect for the law. And yet what can an appellate judge before whom a jury case is brought on appeal do but administer the system in all its technicality? The results may be most regrettable, and perhaps the court, although forced to grant a new trial, may feel keenly the unfortunate result, even the practical injustice, of the action that an honest regard for the law compels it to take.

Such a case, it seems to us, is probably the night-rider case in Tennessee. There, after lawlessness had been awed by a swift and stern administration of justice, after every mouth had showered praise on the acts of the Tennessee authorities, and pointed as a model to the immediate trial and conviction of the perpetrators of a revolting and cold-blooded murder, the Supreme Court has felt compelled to grant a new trial, and thus to undo a large part of the good accomplished.

But while the new trial was granted on technicalities, they were technicalities which are an integral part of that palladium of liberty, trial by jury.

Immunity from Disease as a Crime.

NATURE seems ever to be striving to develop races immune to the attacks of those diseases to which from climatic or local conditions the organism is peculiarly exposed. Thus the native animals of South Africa have acquired immunity to the bacterium or germ which is communicated through the bite of the tsetse fly, a bite absolutely fatal to European cattle. Microscopic examination shows that these germs swarm in the blood of the native animals, but apparently without any deleterious results to general health. A partial immunity seems to have been acquired by European races to tuberculosis, pneumonia, and other forms of disease to which civilized man is especially exposed; at least these diseases are far more fatal among primitive and savage peoples than among Europeans and their descendants. A race which had acquired immunity against a deadly local germ would of course in the struggle for existence push out one which had no such valuable asset.

It is curious to note how the laws and conditions of modern society act to prevent the development of such immunity among us. In sporadic cases, like that of Mary Mallon, the New York servant girl, and a case recently reported from Norway, particular individuals possess an absolute immunity against the attacks of the typhoid bacillus. The typhoid germ multiplies in such persons without doing the least injury to its host. Among an ignorant primitive people such an individual would survive while those who came in contact with him or her died, and if, as might be, the quality was transmitted to the offspring, the sporadic instances might become the general rule and immunity within a tribe universal.

As things are, however, individuals who possess what in a condition of nature would be a most valuable asset, find that the possession has the effects of a grave crime. It leads to and necessitates a life sentence of isolation from their fellowmen, and a mild form of imprisonment. The police powers of the State, interposing for the safety of the people — and *salus populi est suprema lex* — is compelled to punish the innocent and to stamp out the immunity lest a widespread mortality should result.

Campaign Contributions by Judges.

FROM time to time the discussion of the insufficiency of judicial salaries in many parts of the country occupies a considerable place in the newspapers, a discussion in which we have now and then taken an interested part. A startling side light is thrown upon this and other questions connected with our judicial system by a recent report of a committee of the Pennsylvania Bar Association on the subject of judicial contributions to political campaign funds. "The cost," says the report, "of a successful judicial campaign in a number of counties ranges from $15,000 to $25,000 and upward," and the legislature is asked to pass a law prohibiting candidates for the bench from contributing to campaign funds.

If the salary attached to the office is fair and adequate, it is evidently neither fair nor adequate after these deductions have been made. If the salary is so much in excess of a reasonable provision for the needs of the judgeship that these large amounts may be taken away without the recipient feeling straitened in his circumstances, then it might be fairly argued that it should be reduced. Of course in fact such contributions represent an assessment *in invitum* and ill spared by candidates who are dependent upon the salary as a means of living.

But more important is the partisan atmosphere which the transaction leaves about the judicial office, and the lowering of the judgeship by reducing it to a matter of bargain and sale, a place to be scrambled and bid for by politicians. Such things present a strong argument for an appointive as against an elective bench. But this is an abuse of the elective system and not, we are glad to say, a necessary adjunct of it.

THE way to do complete justice, indeed, is to let in the one side, without prejudicing the other. Lord Mansfield, *Rex* v. *Phillips*, (1758) 1 Burr. Part IV. 304.

PROPERTY RIGHTS IN UNION LABELS.

WHEN, for the purpose of distinguishing the product of their labor from cigars made by Chinese, the members of the cigar makers' unions of California adopted a label which they attached to all boxes of cigars made by them, they were no doubt unaware that they had created a new species of property. This label, which was subsequently adopted at a convention of the Cigar Makers' International Union held in 1880, purported to be a guaranty that the cigars were made by first-class workmen, members of an organization opposed to "rat-shop, coolie, prison, or filthy tenement-house workmanship." The labels facilitated the sale of cigars. Cigars to which such labels were attached also commanded a higher price than similar cigars without such labels. The advantages thus gained by manufacturers to whose products union labels were attached enabled union workmen to secure better terms of employment. The economic value of union labels was soon realized by organized workmen in other branches of industry, who likewise adopted labels. The advantage of union labels in the sale of products resulted, however, in the extensive use by dishonest manufacturers and merchants of counterfeit union labels or of genuine labels obtained surreptitiously.

When the labor unions applied to the courts for protection in the exclusive use of their labels, the defense uniformly relied on was that, notwithstanding the fact that the use of spurious labels was a fraud upon the public, the unions were not entitled to protection because they had no property right in their labels. This contention was based on the ground that, as the unions were not the owners of the commodities to which the labels were attached, they did not come within the principles governing the law of trademarks, which had theretofore been applied exclusively to the protection of the invested capital of manufacturers and merchants and not to the labor of workingmen. In a number of unreported decisions in lower courts labor unions were recognized as having a property right which, though not identical with the right in a technical trademark, was entitled to protection from unfair competition. One of the earliest of these decisions was rendered in 1886 by the late Judge Charles E. Phelps, in the Circuit Court of Baltimore. "The idea of property," said Judge Phelps, "is necessarily a progressive one and is capable of development corresponding to the changes in the relations of men in a growing society. . . . The essentials of property are a 'distinguishable existence in the thing claimed as property and an actual value in that thing to the true owner.' . . . It will not be denied that every freeman has a property right in his own labor, whether present or prospective. From this broad general principle it is easy to develop the proposition that an association of men, who combine for the purpose of increasing by legitimate means the general demand for their common labor, have a property right in whatever lawful instrumentality they can succeed in creating and controlling for that purpose. To apply the test already mentioned, if such an instrumentality has a distinguishable existence, if it has an actual value to those claiming to be its owners, it is property. . . . Notwithstanding no precedent may be found among the reported cases in the highest courts of England or this country, it seems sufficiently clear upon principle that the device of the label which the union has originated as its instrumentality for the purpose indicated, and which the demurrer admits has effectually accomplished its object in the increasing demand for the labor of the members and thereby increasing the value of their labor, is a property right of the union in which all the members have a common interest." *Cigar Makers' Union No.* 1 v. *Link,* quoted in 29 L. R. A. 203. A similar conclusion was reached in *Strasser* v. *Moonelis,* 55 N. Y. Super. Ct. 197. An appeal from that decision to the New York Court of Appeals was dismissed on the ground that the order was not appealable. Ruger, C. J., remarked, however, that whether labor unions which are not owners of the product of their members are entitled to protection in the use of their labels is a serious legal question which the court had no occasion to pass upon. 108 N. Y. 611. In two decisions by lower courts of the same State union labels were treated as trademarks. One of these cases was a prosecution under a statute prohibiting the use of counterfeit trademarks. *People* v. *Fisher,* 50 Hun (N. Y.) 552; *Bloete* v. *Simon,* 19 Abb. N. C. (N. Y.) 88.

In 1887 the question was presented to the Supreme Court of Minnesota. That court was equally divided on the question whether a labor union has a proprietary interest in its label. The division resulted in the affirmance of the affirmative answer of the lower court. *Allen* v. *McCarthy,* 37 Minn. 349. When the question was again presented to the Supreme Court of that State, the judges again reached different conclusions. Three of the judges concluded that labor unions had no property right in their labels because the latter did not possess the essential characteristics of trademarks. Two of the judges were, however, of the opinion that the principles of the law of trademarks could be applied so as to insure to members of labor unions the benefits of their reputation as skilled workmen. *Cigar Makers' Protective Union* v. *Conhaim,* 40 Minn. 243. The ultra-conservatism of the Minnesota court in making the recognition of a property right in union labels dependent upon the applicability of the law of trademarks also characterizes decisions of the Chancery Court of New Jersey and of the Supreme Court of Pennsylvania. However, from the opinion of the latter court it is not clear whether, if the court had not misconstrued the contents of the cigar makers' label as a disparagement of nonunion labor, it would not have recognized the right of union labels to protection independently of the legal principles governing trademarks. *Schneider* v. *Williams,* 44 N. J. Eq. 391; *McVey* v. *Brendel,* 144 Pa. St. 235. That a union label is not a trademark was held also by the Supreme Judicial Court of Massachusetts. That court, however, discussed the question whether the use of spurious labels should be enjoined for the purpose of preventing unfair competition. But because the benefits derived from the use of labels by unions are not as tangible as those derived by merchants, the court failed to recognize the value of labels to unions. Devens, J., said: "The plaintiffs show by their bill that they have a right to use the label in question, and that it is a valuable privilege; but although they aver that they have suffered loss by the use of it by the defendant, they do not show that any business which they pursue has been affected, or that they can have sustained any definite loss or any injury, except that which must be extremely remote and purely speculative." *Weener* v. *Brayton,* 152 Mass. 101. A decision of the Federal Circuit Court for the Eastern District of Minnesota, wherein similar views were entertained, is distin-

guishable from the decisions cited. At the instance of a cigar manufacturer, who had built up a profitable business by the use of the labels of a union of which he was a member, a defendant was enjoined from selling spurious labels. The plaintiff did not have the right to the exclusive use of the labels, nor did the labels indicate the origin of the goods. But as the plaintiff was the owner of the goods to which the labels were attached, the decision has no direct application to labor unions, which are ordinarily composed of employees. *Carson* v. *Ury,* 39 Fed. 777.

Evidently these decisions have been the cause of remedial legislation. Since 1889 statutes, the express purpose of which is to authorize labor unions to adopt and to register labels, and to maintain proceedings for the protection of such labels, have been enacted in most of the States. The usual statutory remedies for the infringement of union labels are criminal prosecutions, injunctions, and the recovery of damages. Since the enactment of these statutes a large number of civil and criminal proceedings involving infringements of union labels have been before the appellate courts. *Lawler* v. *Merritt,* 78 Conn. 630, 79 Conn. 399; *Cohn* v. *People,* 149 Ill. 486; *Vogt* v. *People,* 59 Ill. App. 684; *Job Printers' Union* v. *Kinsley,* 107 Ill. App. 654; *State* v. *Hagen,* 6 Ind. App. 167; *Beebe* v. *Tolerton, etc., Co.,* 117 Ia. 593; *Hetterman* v. *Powers,* 102 Ky. 133; *Tracy* v. *Banker,* 170 Mass. 266; *State* v. *Bishop,* 128 Mo. 373, *disapproving State* v. *Berlinsheimer,* 62 Mo. App. 168; *State* v. *Niesmann,* 101 Mo. App. 507; *Schmalz* v. *Wooley,* 57 N. J. Eq. 303; *Cigar Makers' International Union* v. *Goldberg,* 70 N. J. L. 488, 72 N. J. L. 214; *Perkins* v. *Heert,* 158 N. Y. 306; *Lynch* v. *John Single Paper Co.,* 115 N. Y. App. Div. 911; *Bulena* v. *Newman,* 10 Misc. (N. Y.) 460; *Myrup* v. *Friedman,* 58 Misc. (N. Y.) 323, *affirmed* 112 N. Y. S. 1138; *Cigar Makers' Protective Union* v. *Lindner,* 3 Ohio Dec. 244; *Cigar Makers' Int. Union* v. *Burkhart,* 9 Ohio Dec. 459; *United Hatters* v. *Loeb,* 12 Ohio Cir. Dec. 272; *Com.* v. *Norton,* 16 Pa. Super. Ct. 423; *Com.* v. *Meads,* 29 Pa. Super. Ct. 321. See also *Comer* v. *State,* 103 Ga. 69; *Butler* v. *State,* 127 Ga. 700; *Smith-Dixon Co.* v. *Stevens,* 100 Md. 110. The provisions of the statutes relating to the adoption, registration, and civil protection of union labels are undoubtedly a legislative recognition of a property right in such labels. The statutes indicate "the growth and expansion and perhaps the creation of legal remedies hardly known to the ancient trademark law." *Hetterman* v. *Powers,* 102 Ky. 133.

With reference to the necessary contents of union labels an extremely narrow interpretation of the provisions of such a statute has been adopted by the Connecticut Supreme Court. *Lawler* v. *Merritt,* 78 Conn. 630, 79 Conn. 399. But the attitude of the Massachusetts and the New Jersey courts towards the question has, since their earlier decisions, undergone a marked change. It appears that the Massachusetts statute prohibits merely the use of counterfeit labels. Nevertheless the Supreme Judicial Court of that State has held that labor unions which have established their rights to their labels should be protected against one form of swindling as well as another — against the fraudulent use of genuine labels as well as against the use of counterfeits. But a more significant statement was made by Mr. Justice Holmes, who said that the use of the labels is "of far more economic importance to the union than are many, if not most, of the trademarks, strictly so called, which are protected by the courts." *Tracy* v. *Banker,* 170 Mass. 266. It is evident that if the Massachusetts court had entertained this view in 1890 it would have reached a different conclusion in *Weener* v. *Brayton,* referred to above. The New Jersey Court of Errors and Appeals has reversed a decision of the vice-chancellor (56 N. J. Eq. 649) which was based on *Schneider* v. *Williams,* also referred to above. The court said that the expressions in the opinion in *Schneider* v. *Williams,* unless they should be interpreted to mean that the title in a trademark depends on the actual marketing of the commodity, and not on the person by whom it is marketed or owned, were unwarranted. "Why should this specific personal element be deemed important?" said Dixon, J. "The public object sought in the protection of trademarks is to bring upon the market a better class of commodities, and the means for attaining that object is by securing to those who are instrumental in supplying the market whatever reputation they gain by their efforts toward that end. The workman by whose handicraft the commodity is made is one of these instruments, just as is his employer who furnishes the raw material and owns and sells the finished product; and if the former is permitted by the owner to place upon the commodity a mark to indicate whose workmanship it is and thereby commend his workmanship to other employers, this license from the owner should be deemed a right against everybody else. His aptitude in his trade is his property, and if by a mark he can have it identified as his in the market, he may enhance its salable value and thus secure the same sort of advantage as his employer by similar means. No reason exists why this advantage should not be protected by the courts in the same manner and to the same extent as is the like advantage of the employer. The mere fact that one rather than the other of these persons has placed the product upon the market has no rational bearing upon the matter, for both alike have had the market in view in the efforts they have made, and through those efforts the market is supplied." *Schmalz* v. *Wooley,* 57 N. J. Eq. 303. The Kentucky Court of Appeals had occasion to pass upon the question in a suit which had been instituted before the enactment of the statute. The court approved the statement of the chancellor that "the known reputation of a particular kind of skilled labor employed in the development of a particular product or class of products determines, to a large degree, the value or price of such products when put on the markets. To stamp or label a commodity as the product of a particular kind or class of skilled labor determines the demand for and the price of such product or commodity. The marketable price of a commodity influences the scale of wages paid for its manufacture. The higher the price, the higher the wages paid; hence it is indisputable that the employee whose skilled labor, in the production of a particular commodity, creates a demand for the same, that secures for him higher remunerative wages, has as definite a property right to the exclusive use of a particular label, sign, symbol, brand, or device, adopted by him to distinguish and characterize said commodity as the product of his skilled labor, as the merchant or owner has to the exclusive use of his adopted trademark on his goods." *Hetterman* v. *Powers,* 102 Ky. 132, 138–140.

According to this decision the value of labels to labor unions consists in the increase in wages of their members resulting from their reputation as skilled workmen

and the consequent enhancement of the price of goods bearing such labels. It may be observed, however, that the demand for union-made goods may be due to a disposition to foster trade-unionism as a means of promoting the welfare of a large body of workingmen, rather than to secure goods made by skilled labor under sanitary conditions. The benefits resulting from the good will of a large proportion of the purchasing public, secured by means of an extensive propaganda, the labor unions are able to reap only through the instrumentality of labels. If this instrumentality shall be protected by the courts, self-interest may prevent employers from attempting to disrupt labor unions by means of lockouts. Consequently, in industries to which the use of labels is adapted, such labels are likely to prove an important factor in the struggle between labor unions and employers' organizations. This was no doubt recognized by Mr. Justice Holmes when he spoke of the economic importance of union labels. But union labels, even if recognized as a legitimate instrumentality of trade-unionism, are valueless unless the unions are protected in the exclusive use of such labels. In view of the statutes and the later decisions, there can be no doubt, however, that the interest of the unions in their labels will be generally recognized and protected as a property right. Incidentally fair dealing will be promoted and imposition upon the public prevented.

PHILIP SACHS.

A PROPOSED CHANGE FOR THE WORSE.

IN an address made shortly before his election to the Presidency, Mr. Taft, after dwelling upon and deprecating the tendency of many appellate courts to reverse judgments on grounds which are purely technical in the sense that they do not affect the merits, was reported as advocating the enactment in each State of a statute prohibiting reversals unless the appellate court, after consideration of the whole record, could declare either that the judgment of the trial court was for the wrong party, or that a different judgment would have been rendered if the errors complained of had not been committed. Mr. Taft's ability as a lawyer and eminence as a judge have naturally given weight to his reported suggestion, and in several States bills conforming, with more or less fidelity, to the supposed suggestion have been introduced. The house of representatives of the Missouri general assembly has, according to the lay press, passed a bill providing that appellate courts "may not reverse or remand any judgment rendered in any civil or criminal case on any ground unless the court, after an examination of the entire record, can say that the judgment of the trial court was for the wrong party, and that but for the errors complained of, a different judgment would have been rendered."

Perhaps similar bills have become statutes in other States as a result of the vigorous efforts to that end.

Such a statute can but work injustice. Its enforcement would, in countless cases, wrongly (from the ethical point of view) deprive suitors of life, liberty, or property. For the sake of all persons who may be so unfortunate as to become parties to any sort of legal or equitable action, suit, or proceeding, the hope is entertained that sober consideration of the dire results which must follow the enactment into law of such a proposal will induce the prompt repeal of any such statute and the unfavorable disposition of any such bill.

A statute of this kind is demonstrably bad, as will presently be shown. In unambiguous language the legislature forbids the appellate court to reverse a judgment unless two conditions exist concurrently. What are these conditions? The appellate court must be able "to say [1] that the judgment of the trial court was for the wrong party; and [2] that but for the errors complained of, a different judgment would have been rendered." Were the second condition omitted, the first condition would be enough to condemn. But when both conditions are required to exist, the situation becomes intolerable. A few examples will serve to prove the truth of this assertion.

In an action upon a promissory note where the defenses were payment and the bar of the statute of limitations, the trial court erroneously excluded certain evidence tending to prove payment, and also certain evidence tending to establish the bar of the statute of limitations. There was other evidence admitted which tended to prove each defense. The court erroneously charged the jury that there was no evidence tending to prove either payment or the statutory bar. The jury found for plaintiff, and defendant, by writ of error, appealed from the judgment, assigning the three errors mentioned as grounds for reversal. Now the appellate court, observing the command and the prohibition of the statute, examines the entire record. It finds that each of the assignments is well urged — that is, the trial court committed three material errors against defendant. But the appellate court may not reverse the judgment, because it cannot (1) "say that the judgment of the trial court was for the wrong party," for nothing appears from which the court can determine that the judgment should have been for defendant; nor can it (2) "say that but for the errors complained of, a different judgment would have been rendered," and it cannot so say because it is unable to determine what would have been the effect upon the jury had the excluded evidence been admitted and the erroneous instruction not given. The credibility of the witnesses was for the jury, as was also the weight to be given to the evidence, and that body *might* still have found for the plaintiff, though no errors had been committed. So the appellate court must affirm the judgment, although upon the face of the record material and possibly grievous wrong appears which *may* have prevented verdict and judgment for defendant.

In a suit in equity the chancellor, after erroneously limiting the time within which depositions may be taken so that complainant is denied the right to full cross-examination of a witness who dies before final hearing, and committing many errors in rejecting material oral testimony offered by complainant, finds for defendant, and a decree dismissing the bill is entered. Upon appeal the court cannot say either that the judgment was for the wrong party, or that but for the errors a different judgment would have been rendered; for the court does not and cannot know what full cross-examination might have disclosed nor what weight the chancellor would have given to the rejected oral testimony if it had been admitted. If none of the errors had been committed, a decree for the defendant *might* still be for the right party. Without the errors a different decree *might* not have been rendered or required — defendant *might* be entitled to the precise re-

lief which he obtained. But the appellate court may not reverse unless it can say that the decree *should* have been for the complainant, and that a different decree from the one appealed from *would* (not *might*) have been entered but for the errors. So the decree must be affirmed.

On a trial for murder the court erroneously excluded evidence tending to prove an alibi, ruled out testimony tending to prove the previous good reputation of the prisoner for peace and quietude, and charged the jury that the proof of guilt was clear and that a verdict should be returned accordingly. The prisoner was convicted and sentenced to be hanged. In vain does he appeal or sue out a writ of error. The appellate court is powerless. It cannot say that the judgment was for the wrong party, *i. e.*, for the State, whereas it ought to have been for the prisoner. Neither can it say that "but for the errors complained of a different judgment *would* have been rendered." Had the trial court been free from error, the verdict and judgment that were entered *might* have been rendered, and rightly, because the jury *might* have discredited the testimony tending to prove an alibi and the testimony of previous good reputation, or disbelieved the former and believed the latter to be true, but that the prisoner was guilty despite his previous good reputation or even previous good character. The appellate court does not know what effect the excluded evidence would have had upon the minds of the jury. A different verdict and judgment *might* have been rendered but for the errors complained of; yet the appellate court may not reverse unless it can say (1) that the judgment was (not *might* have been) for the wrong party, and (2) "that but for the errors complained of, a different judgment *would* [not *might*] have been rendered." Being unable to say that either condition exists, the appellate court must affirm the judgment and the prisoner must be hanged, though he *might* have been acquitted, or a different judgment *might* have been rendered, if the trial court had not erred.

Illustrations innumerable could be given, but the foregoing should seem to be sufficient to reveal the unwisdom of a statute which probably prohibits reversals except for erroneous judgments upon the pleadings, or upon agreed statements of fact, or their equivalents.

W. T. PIGOTT.

HELENA, MONTANA.

STATE CONTROL OF FOREIGN CORPORATIONS.[1]

ONE of the most frequently repeated of famous *obiter dicta* is that of Chief Justice Taney in the case of *Bank of Augusta* v. *Earle*, 13 Pet. 519–589:

"It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

This statement was purely *obiter*, for the decision, which upheld the validity of a purchase in Alabama by the agents of certain corporations of other States of bills of exchange drawn there upon payees in New York, did not necessarily involve an affirmance or denial of the power of foreign corporations to migrate, but merely of their capacity to empower agents to make purchases for them outside the States of their creation. On this point the chief justice said:

"Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract, within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?"

The discussion then ran on to the question whether or not by the comity of nations, and between the States, corporations of one State were permitted to make contracts in another, and it was noted in passing that "in England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts," and that "it has been decided in many of the State courts, we believe in all of them where the question has arisen, that a corporation of one State may sue in the courts of another." (p. 590.)

In the argument at the bar Mr. Webster said:

"My learned friend says, indeed, that suing and making a contract are different things. True; but this argument, so far as it has any force, makes against his cause; for it is a much more distinct exercise of corporate power to bring a suit, than by an agent to make a purchase. What does the law take to be true, when it says that a corporation of one State may sue in another? Why, that the corporation is there, in court, ready to submit to the court's decree, a party on its record. . . .

"The truth is, that this argument against the power of a corporation to do acts beyond the territorial jurisdiction of the authority by which it is created is refuted by all history as well as by plain reason.

"What have all the great corporations in England been doing for centuries back? The English East India Company, as far back as the reign of Elizabeth, has been trading all over the Eastern world. That company traded in Asia before Great Britain had established any territorial government there, and in the other parts of the world, where England never pretended to any territorial authority. The Bank of England, established in 1694, has been always trading and dealing in exchanges and bullion with Hamburg, Amsterdam, and other marts of Europe. Numerous other corporations have been created in England, for the purpose of exercising power over matters and things in territories wherein the power of England has never been exerted. The whole commercial world is full of such corporations, exercising similar powers beyond the territorial jurisdiction within which they have legal existence."

The chief justice yielded to this argument. "We think it is well settled," he wrote, "that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union."

This conclusion demonstrated, as Mr. Webster pointed out, the fallacy of the proposition that a corporation can have no existence beyond the limits of the State where it is organized, and the recognition of such existence has been almost universal from the date of that decision to the present time.

In an early case in New York, the highest court of that State recognized and affirmed the right of its citizens to go into an adjoining State and there procure a charter for the express purpose of carrying on business in the State of their residence; and the right of a State to grant to persons within its jurisdiction a corporate character and capacity to be exercised either

[1] An address by Hon. George W. Wickersham, Attorney-General of the United States, before the Kentucky State Bar Association.

within or without its territorial bounds was asserted. "It cannot enlarge its own jurisdiction," said the court, "but it can confer general powers to be exercised within its bounds, or beyond them, wherever the comity of nations is respected. For the purposes of commerce such a commission is regarded like a government flag, as a symbol of allegiance and authority; and it is entitled to recognition abroad until it forfeits recognition at home." *Merrick* v. *Van Sanford,* 34 N. Y. 208.

The migrating tendencies and powers of corporations were recognized in *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527-537, where Chief Justice Waite, after repeating the dictum from *Bank of Augusta* v. *Earle,* that "a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty,'" proceeded to demonstrate its inaccuracy by adding, "though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad* v. *Koontz,* 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel,* 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia,* 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

In the case of *Adams Express Company* v. *Ohio,* 166 U. S. 185, on a petition for a reargument of the cases involving taxation of express companies (reported 165 U. S. 255), Mr. Justice Brewer, delivering the opinion of the court, said:

"It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was '*mobilia personam sequuntur,*' but that maxim was never of universal application and seldom interfered with the right of taxation. . . . It is also true that a corporation is, for purposes of jurisdiction in the federal courts, conclusively presumed to be a citizen of the State which created it, but it does not follow therefrom that its franchise to *be* is for all purposes to be regarded as confined to that State. For the transaction of its business it goes into various States, and wherever it goes as a corporation it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to *do* is an independent franchise, or rather a combination of franchises embracing all things which the corporation is given power to do, and this power to *do* is as much a thing of value and a part of the intangible property of the corporation as the franchise to *be*. Franchises to *do* go wherever the work is done."

It was accordingly held in that case, that, in determining the value of that proportion of the capital of the Adams Express Company, organized in New York, which was employed in business in Ohio, Indiana, and Kentucky, respectively, it was lawful to include not merely the tangible value of the property, but that proportion of the intangible property which the value of the tangible property in one State bore to the aggregate of the tangible property in all the States.

The legislatures of almost all the States have enacted regulations based on a recognition of the power of corporations to migrate and establish and conduct their business in States other than those in which they are incorporated. Not very long after the decision in *Bank of Augusta* v. *Earle,* the United States Supreme Court was confronted with a case where a corporation of Indiana had assumed to migrate from that sovereignty to Ohio, and an action was brought in the latter State to recover upon a contract made by the corporation within that State, process being served upon an agent of the corporation then within that State, on which judgment was entered against the company. In an action against the corporation on such judgment in the United States court within the State by which defendant was incorporated, the judgment sued on was challenged upon the ground that no jurisdiction over the corporation could be obtained by service of process on it in Ohio.

The court said that while the corporation, existing only by virtue of a law of Indiana, could not be deemed to pass personally beyond the limits of that State, it could submit itself to the jurisdiction of that State by appointing an attorney to appear there; and it was held on the facts of the case that by entering into the State of Ohio and transacting business under its laws, the corporation had in effect consented to be sued in that State. *Lafayette Ins. Co.* v. *French,* 18 How. 404, 407.

Mr. Justice Curtis, writing the opinion of the court, said:

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Corporations continued to migrate, and to an increasing degree the business of the country was conducted through association in corporate form. The States availing of the right pointed out in the Bank of Augusta case enacted legislation modifying and regulating the comity by virtue of which corporations were permitted to do business in foreign States, and in the case of *Paul* v. *Virginia,* 8 Wall. 168, there was squarely presented to the Supreme Court the question whether or not there were any limitations upon the power of a State to regulate the transaction of business within its jurisdiction by corporations organized under the laws of other sovereignties. The court held that, as a corporation of one State had no absolute right of recognition in other States, but depended for such recognition and the enforcement of its contracts on their assent, it followed that such assent might be granted upon such terms and conditions as those States might think proper to impose. "They may exclude the foreign corporation entirely," said Mr. Justice Field, in delivering the unanimous opinion of the court, "they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interests. The whole matter rests in their discretion."

The contention was made that the statute of Virginia under consideration in that case regulating the character of corporations which should be allowed to carry on business in the State of Virginia, was in conflict with that clause of the Federal Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" but the answer was made that corporations are not citizens within the meaning of that provision. "The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed."

This decision has been uniformly followed by the Supreme Court, and has been very recently reaffirmed in the case of *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, where the court upheld, as applicable to and binding upon a foreign cor-

poration theretofore licensed to do business in Arkansas, a statute of Arkansas which made it a crime for any corporation, foreign or domestic, to become a member of or party to any pool, trust, agreement, combination, or understanding, made within the State or elsewhere, to regulate or fix, either within the State or elsewhere, the price of any commodity within the State or elsewhere; or to become a member of or party to any agreement, contract, combination, or association made within the State or elsewhere, to fix or limit, either within the State or elsewhere, the amount or quantity of any article of manufacture, etc. Mr. Justice White, in delivering the unanimous opinion of the court, said:

"As the State possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that if the State exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play. This being true, it follows that, as the power of the State to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the State, unless by the act of admission some contract right in favor of the corporation arose, . . . it follows that the prohibition against continuing to do business in the State because of acts done beyond the State was none the less a valid exertion of power as to a subject within the jurisdiction of the State."

The unlimited extent of the power of the States recognized by the Supreme Court is strikingly illustrated by the decision in the case of *Security Mutual Life Insurance Co.* v. *Prewitt,* 200 U. S. 446; also 202 U. S. 246, where the constitutionality of a statute of Kentucky was upheld which enacted that, before authority is granted to any foreign insurance company to do business in the State, it must file with the commissioner a resolution of its directors consenting that service of process upon any agent of the company within the State or upon the commissioner of insurance, in any action brought or pending in the State, shall be a valid service upon the company; but if the company should, without the consent of the other party to any suit brought by or against it in any court of the State, remove the same to any federal court, or institute any suit or proceeding against any citizen of Kentucky in any federal court, it should be the duty of the commissioner to forthwith revoke all authority to such company to do business within the State. The court had previously held that a statute requiring a foreign corporation, as a condition to obtaining a license to do business within the State, to stipulate in writing that it would not remove into the federal courts any suits brought against it in the State courts was void, because it made the right to do business under the license or contract depend upon the surrender by the corporation of a privilege secured to it by the Constitution.[2]

But such ruling was distinguished by the court upon the ground that, while a State might not require a corporation to so stipulate in advance, it was perfectly constitutional for it to enact that if a foreign corporation did remove a case into the federal court or bring a suit there, its license should be revoked. The result of this decision is to enable a State to compel a foreign corporation to refrain from resorting to the federal courts in controversies brought by or against it, or else to cease to do business within that State, that is, to make its continuance within a State depend upon the practical surrender of a right which the Supreme Court itself had declared was secured to it by the Constitution.

Not only has the Supreme Court held that corporations are not citizens within the provisions of section 2 of article IV. of the Constitution, which secure to the citizens of each State "the rights, privileges, and immunities of citizens in the several States," but it has also held that they are not "citizens" within that provision of section 1 of the Fourteenth Amendment to the Constitution which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Norfolk, etc., Railroad Company* v. *Penn,* 136 U. S. 114–118; *Paul* v. *Virginia,* 8 Wall. 168. The court has, however, held them to be "persons" within those provisions of the same section of the Fourteenth Amendment which declare that no State shall "deprive any person of life, liberty, or property without due process of law" (*Minn. Railway Co.* v. *Beckwith,* 129 U. S. 268), nor "deny to any person within its jurisdiction the equal protection of the laws." *Smythe* v. *Ames,* 169 U. S. 468. The equal protection of the laws which corporations may claim is, however, only such as is accorded to similar associations within the jurisdiction of the State. *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181–188; *Santa Clara* v. *Southern Pacific,* 118 U. S. 394–396. Corporations are, of course, also entitled to the benefit of the provisions of section 10 of article I. of the Constitution, which prohibits a State from passing any law impairing the obligation of contracts. This section furnished the basis for the decision in *American Smelling and Refining Company* v. *Colorado,* 204 U. S. 103, where it was held that although a State may impose different liabilities on foreign than those imposed on domestic corporations, a statute requiring foreign corporations to pay a fee based on their capital stock for the privilege of entering the State and doing business therein and thereupon to be subjected to all liabilities and restrictions of domestic corporations, amounts to a contract with foreign corporations complying therewith that they will not be subjected during the period for which they are admitted to greater liabilities than those imposed upon domestic corporations, and that a subsequent statute imposing higher annual license fees on foreign than on domestic corporations for the privilege of continuing to do business is void as impairing the obligation of such contract, as respects those corporations which have paid the entrance tax and received permits to do business; and that the tax could not be justified under the power to alter, amend, and repeal reserved by the State constitution (of Colorado). But the effect of this decision was greatly restricted by that in *Hammond Packing Company* v. *Arkansas,* 212 U. S. 322–344, where it was held that, as the constitution of Arkansas authorized foreign corporations to do business in that State subject to the same regulations and with the same rights as those enjoyed by domestic corporations, and the statutes of the State authorized permits to be issued to foreign corporations, subjecting them to the same privileges as domestic corporations on payment of the same fees and on compliance with similar statutory requirements, and the constitution reserved to the legislature power to repeal, alter, or amend charters of incorporation "provided no injustice shall be done to the corporators," it was competent, without impairing the obligation of the contract made with it by the State in admitting it to do business, to enact a statute to prevent all foreign corporations from doing business in Arkansas if they should be members of a trust, combination, or conspiracy against trade, whether such trust, pool, combination, or conspiracy should affect or was intended to affect prices or rates in Arkansas or not.

"By the constitution and laws of the State of Arkansas," said Mr. Justice White, in delivering the opinion of the court, "it is said foreign corporations, when lawfully admitted to do

[2] *Insurance Co.* v. *Morse,* 20 Wall. 455; *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535; *Barron* v. *Burnside,* 121 U. S. 181; *Southern Pacific Co.* v. *Denton,* 146 U. S. 202–207; *Barrow* v. *Kane,* 170 U. S. 100; *Blake* v. *McClung,* 172 U. S. 239–255.

business in the State, were entitled to rights equal to those enjoyed by domestic corporations. . . . The chartered right to do a particular business did not operate to deprive the State of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interests of the public welfare. Besides, it is not disputed that the State under its constitution had a reserved power to repeal, alter, and amend charters by it granted, and therefore, even if the impossible assumption was indulged that the grant of the power to do business implied in the absence of such reservation the right to carry on the business in violation of a lawfully regulating statute, the existence of a reserve power leaves no semblance of ground for the proposition. The claim of an irrepealable contract cannot be predicated upon a contract which is repealable. . . . The determination whether the power to repeal, alter, or amend was exerted in such a manner as to be unjust to incorporators was within the province of the State court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract laws, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States."

As a result of the decisions referred to, it may be safely asserted that the only limitation upon the powers of the States to exclude foreign corporations entirely from doing business within their territory, or to prescribe such conditions as they may deem proper to the carrying on by them of such business, are, first, that the regulations so prescribed shall not deprive the foreign corporations of property without due process of law, or deny to them the equal protection of the laws; and, secondly, that such regulations shall not amount to an interference with interstate commerce, or with other business of a federal nature.

In *Hooper* v. *California,* 155 U. S. 648, Mr. Justice White said:

"The principle that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such other State, has been long settled. . . . Whilst there are exceptions to this rule they embrace only cases where a corporation created by one State rests its right to enter another and to engage in business therein upon the federal nature of its business, as, for instance, where it has derived its being from an Act of Congress and has become a lawful agency for the performance of governmental or *quasi*-governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce and is, therefore, solely within the paramount authority of Congress. In these cases the exceptional business is protected against interference by State authority."

In general almost all of the States require foreign corporations to file in an appropriate office copies of their charters and to designate a local agent on whom process may be served. A number of the States require a license to be procured upon compliance with more or less simple requirements, and a license fee to be paid predicated upon the amount of capital to be employed in business within the State. The constitutions of California, Kentucky, Montana, Utah, Washington, and Oklahoma provide that no foreign corporation shall be authorized to do business within the State on more favorable conditions than domestic corporations. Some of the States have restricted the power of foreign corporations to hold title to land within their borders; thus, in Georgia, a foreign corporation can only own land in the State to an amount not exceeding 5,000 acres (Civil Code, § 1849); in Minnesota to not more than 90,000 square feet, and in Mississippi to a value of not exceeding $2,000,000. In Iowa a foreign corporation can only hold real estate when acquired in satisfaction of a debt, and must sell it within ten years. In Michigan a foreign corporation cannot hold any land for more than ten years, except such as is actually occupied by it in the exercise of its franchises. The statutes of Missouri require a foreign corporation doing business in that State to procure a license upon application filed with the secretary of state, accompanied by a copy of its articles of association, "and if it shall appear that such company or corporation could not organize under the laws of this State the license shall be refused."

The laws of that state provide that a certificate of incorporation for a business corporation shall only be granted if the entire capital stock specified in the articles of association shall be subscribed, and one-half paid in in cash; and the courts of that State have sustained the refusal by the State officials to grant a license to a foreign corporation because its entire authorized capital was not subscribed. The laws of Missouri further enact that no foreign corporation organized by residents of Missouri to evade the laws of that State shall be licensed to transact business within the State, and a foreign corporation whose capital stock exceeds $10,000,000 may only obtain a license if the proportion of its capital stock employed within the State shall not exceed the capital which domestic corporations are permitted to have. Laws 1903, p. 121; 1907, p. 168.

An annual franchise tax on a percentage basis, computed on the full amount of the authorized capital stock, is imposed on both foreign and domestic corporations alike by the laws of Alabama, North Carolina, and Vermont. A greater tax is imposed upon foreign than upon domestic corporations of the same character in Colorado and Texas. Under a statute of Kansas, requiring "every foreign corporation authorized by the charter board to engage in business in this State" to "pay all the fees required by this act to be paid by domestic corporations," the Supreme Court of Kansas has held that a foreign corporation doing business in that State which increased its capital stock from $7,000,000 to $12,000,000 was obliged to pay a tax in Kansas upon the entire amount of such increase, irrespective of the question of what proportion of the increased capital was employed in business in the State of Kansas. *Cudahy Packing Co.* v. *Denton,* 97 Pac. Rep. 439, rehearing 99 Pac. Rep. 601.

In applying a statute taxing foreign corporations upon the amount of capital employed by them within the State, the Supreme Court of Missouri has held that a foreign railroad corporation would be conclusively presumed to have employed in business in that State at least the amount of its capital equal to the minimum capital required of domestic railroad corporations. *State ex rel. R. R. Co.* v. *Cock,* 121 Mo. 348.

A statute in Massachusetts provides that if a foreign corporation owns or controls a majority of the capital stock of a domestic street railway, gas light, or electric light company, and issues stock, bonds, or other evidence of debt based on or secured by the property, franchises, or stock of a domestic corporation, unless the issue be authorized by the laws of Massachusetts the domestic corporation may be dissolved by the Supreme Judicial Court. Laws 1903, c. 437, § 64.

The Public Utilities Law of New York forbids any railroad corporation, domestic or foreign, to acquire the stock of a domestic railroad company or common carrier unless authorized by the Public Service Commission, but enacts that no other kind of stock corporation may acquire or hold more than ten per cent. of the total capital stock of any domestic railroad company or other common carrier. Laws 1907, c. 429, § 54.

These are only a few examples of particular provisions affecting the right of foreign corporations to carry on business in the States mentioned.

Much legislation has been enacted in various States for the purpose of preventing trusts, pools, and combinations in restraint of trade and monopolies. Such was the law under consideration in *Hammond Packing Co.* v. *Arkansas,* 212 U. S.

Many of these acts are long, involved, and abounding in adjectives. Some of them have been more or less effective; most of them have proved ineffective as applied to foreign corporations.

It has seemed to me that an effective method of legislating on this subject would be to enact that no foreign corporation should be licensed to do business within a State if fifty per centum of its capital stock or upwards was owned or held by any other corporation, domestic or foreign, and that if, at any time after obtaining such a license, more than fifty per centum of the capital stock of such corporation should be acquired by another corporation, the license should be *ipso facto* vacated. The device of the holding corporation is the only thing which has made possible the rapid growth of the great trusts and monopolies, and a prohibition such as that stated would go far towards their destruction. Only companies which owned property, as distinguished from stock in other companies, could carry on intrastate business within States other than that of their incorporation, and very few of the great industrial corporations are directly owners of all or even of the greater part of the property with which they conduct their business. The increasing complexity and variety of regulation and taxation of foreign corporations by the various States in which their business is conducted, has rendered it more and more burdensome and difficult for one corporation to directly own and carry on business in a number of different States. This has led to the organization of domestic corporations under the laws of the respective States where business is to be conducted, the capital stocks of which are held by a "holding company" organized under the laws of that State whose legislation is most encouraging to such mode of organization. Such is the organization of practically all of the best-known "trusts." A system of disqualifying State legislation such as suggested, while effective for the purpose, would inevitably increase the demand for federal legislation authorizing the organization of corporations under national law for the conduct of interstate business. Much protection from State interference and discriminatory regulation is already afforded to corporations organized under State laws and engaged in interstate commerce. But more undisputed and clearly defined protection would be secured by national incorporation. In *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181, the court said that the only limitation upon the power of the State to exclude a foreign corporation from doing business within its limits, or to exact conditions for allowing it to do business there, arises when the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign; and the express company cases,[3] the drummers' cases,[4] and the telegraph cases[5] are familiar instances of decisions by the Supreme Court holding State legislation to be unconstitutional as interfering with the federal regulation of interstate commerce.

It would, indeed, be rash at this time to suggest a definition of what constitutes interstate commerce. "Transactions between manufacturing companies in one State, through agents, with citizens of another, constitute a large part of interstate commerce," said the court in *Caldwell* v. *North Carolina,* 187 U. S. 622–632. "Commerce among the States," said Mr. Justice Harlan in the beef case (*Swift & Co.* v. *United States,* 196 U. S. 375–398), "is not a technical legal conception, but a practical one, drawn from the course of business;" and it was there held that when cattle are sent for sale from a place in one State, with the expectation that they would end their transit, after purchase, in another, and when in effect they did so, with only the interruption necessary to find a purchaser at the stock yards, and when this was a typical, constantly recurring course, the current thus existing was a current of commerce among the States, and the purchase of the cattle was a part and incident of such commerce.

The business of the Danbury hat manufacturers, which was held to be interstate commerce in *Loewe* v. *Lawlor,* 208 U. S. 274–304, was summarized from the complaint by the court in the following language:

"Plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty States other than the State of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the State of Connecticut; that at the time the alleged combination was formed they were in the process of manufacturing a large number of hats for the purpose of fulfilling engagements then actually made with consignees and wholesale dealers in States other than Connecticut. . . ."

These cases may be taken as suggestive of the extent of interstate trade or commerce now recognized to be within federal control.

The power of Congress to create corporations as a means to the exercise of its power to regulate commerce among the several States has been affirmed in the case of a bank for the purpose of carrying on the fiscal operations of the government; of a railroad corporation for the purpose of promoting commerce among the States; of the construction of public highways connecting several States, either roads or bridges. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank of United States,* 9 Wheat. 738; *Pacific Railroad Removal Cases,* 115 U. S. 1; *Indiana* v. *United States,* 148 U. S. 148; *Luxton* v. *North River Bridge Co.,* 153 U. S. 525.

If, as the Supreme Court has directly adjudged, Congress has authority, in the exercise of its power to regulate commerce among the several States, to authorize corporations to construct railroads across the States as well as the Territories of the United States, and the power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, why has it not necessarily full power to authorize the formation of corporations to conduct other forms of interstate commerce, not merely transportation, but that character of interstate commerce dealt with in the Sherman Anti-trust Law and described in the decisions in the beef trust and Danbury hat cases? Such corporations formed under national law would not be foreign corporations in any of the States, and would therefore be at liberty to transact their business without State permission and free from State interference.

"The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty." Bradley, J., in *Claflin* v. *Houseman, Assignee,* 3 Otto 130–136.

On this principle, the Supreme Court of Pennsylvania held that the Texas and Pacific Railroad Company, a corporation organized by Act of Congress to construct a railroad from Marshall, Texas, to San Diego, California, having its principal administrative office within the State of Pennsylvania, was not a foreign corporation in that State, and not affected by legislation prohibiting a foreign corporation from carrying on business within that State without first obtaining a license and paying a tax.

"The general government in its relation to that of the several States," said the court, "cannot be considered a foreign government in the ordinary acceptation of that term; within

[3] *Crutcher* v. *Kentucky,* 141 U. S. 47.

[4] *Norfolk & Western Ry.* v. *Simms,* 191 U. S. 44; *Rearick* v. *Pennsylvania,* 203 U. S. 507.

[5] *Pensacola Tel. Co.* v. *Western Union Tel. Co.,* 96 U. S. 1.

the sphere of its delegated powers, its authority extends over all the States of which it is composed, and to that extent it may be said to be identified with the government of each. Hence, a corporation created by the government of the United States cannot with propriety be called a foreign corporation."

Of course, many will object to the centralizing tendency of a national law authorizing the formation of corporations to carry on interstate business; but such a law seems to me to be the inevitable result of economic conditions. The business of manufacture and sale, of barter and trade, is to-day conducted on such a vast scale that it cannot be circumscribed by the boundaries of any one State. On the other hand, no one State can effectively grapple with abuses of the vast power which modern conditions have placed in the hands of those who control great corporate enterprises. The amendment to the tariff bill recently introduced in the Congress, if enacted into law, will, for the first time, require of all corporations, wherever organized, annual reports of those facts concerning their business which their stockholders and creditors and all who deal with them are entitled to know. If, now, Congress shall enact a law providing for national incorporation to carry on interstate commerce, subject to such restrictions and with such freedom from local State control as Congress shall see fit to prescribe, the State control of foreign corporations, in all probability, will soon cease to be a subject of great importance.

Cases of Interest.

EXPENSES OF TRIP FOR HEALTH OF INJURED PERSON AS ELEMENT OF DAMAGES. — In Statler *v.* George A. Ray Manufacturing Co., 88 N. E. 1063, the New York Court of Appeals holds that in an action for damages for personal injuries evidence on behalf of the plaintiff to show the amount of his expenses on a trip claimed to have been for the benefit of his health after the accident is inadmissible, especially where no attempt is made to justify the introduction of such evidence by the testimony of a physician. It is held that while a trip to Europe or to some other part of the country might sometimes be beneficial to the health of an injured person, this means of procuring relief would be, under ordinary circumstances, too remote and indefinite to be regarded as an item of damages proximately resulting from the injuries.

APPLICATION TO UNITED STATES NAVY YARD OF STATE STATUTE PENALIZING FAILURE TO DELIVER TELEGRAMS. — In Western Union Telegraph Co. *v.* Chiles, 29 Sup. Ct. Rep. 613, the federal Supreme Court held that the Virginia statute making it the duty of telegraph companies upon the arrival of a message at the point to which it is transmitted to cause the same to be forwarded and delivered by messenger to the person to whom it is addressed, and imposing a penalty of one hundred dollars for every failure to forward and deliver a message as promptly as practicable, cannot have any operation within the limits of the Norfolk Navy Yard, over which Congress has exclusive legislative power, and that the failure of a telegraph company to deliver a message to an addressee who was a member of the crew of a warship lying at such navy yard cannot be subject to the penalty of the statute. By this decision the judgment of the Supreme Court of Appeals of Virginia is reversed.

VALIDITY OF STATE STATUTE PROHIBITING FURNISHING OF LIQUOR TO INEBRIATE. — In Adams Express Co. *v.* Commonwealth of Kentucky, 29 Sup. Ct. Rep. 633, the United States Supreme Court reversed the conviction of the plaintiff in error in a Kentucky State court for furnishing liquor to an inebriate in violation of a State statute making it a criminal offense for any person to "sell, lend, give, procure for, or furnish spirituous, vinous, or malt liquors, or any mixture of either, knowingly to any person who is an inebriate or in the habit of becoming intoxicated or drunk by the use of any such liquors." The liquor was shipped by licensed dealers, express prepaid, from another State and was delivered by the plaintiff in error's agent to the consignee, who was known by the agent to be in the habit of becoming intoxicated. It was held that the shipment was one of interstate commerce within the exclusive jurisdiction of Congress, and that the statute as applied to such a shipment could not be sustained. Mr. Justice Harlan dissents.

VALIDITY OF COMMUTATION OF DEATH SENTENCE. — The action of the governor of New York in commuting the death sentence of Albert T. Patrick to life imprisonment is attacked on habeas corpus before the Appellate Division Court of the Second Department in People *v.* Frost, 117 N. Y. Supp. 524. It is contended by the relator that a sentence of death cannot be commuted, because commutation is limited to the "same kind and degree of punishment" and that there cannot be any punishment of the same kind and degree as death. It is further contended by him that there cannot be a commutation of the punishment of death to that of life imprisonment, because commutation implies a less punishment, whereas life imprisonment is a greater punishment than death. The court holds that since by law either the death sentence or life imprisonment may be imposed for murder, depending on its degree, the commutation is not invalid for the objection first urged, and that inasmuch as it is the common judgment of mankind that the death sentence is a greater punishment than life imprisonment, the commutation to life imprisonment is not void as inflicting a greater punishment although the convict would prefer death. Other contentions of the relator are rejected, and he is remanded to serve his term.

RIGHT OF CORPORATION TO MAINTAIN ACTION FOR LIBEL AS AFFECTED BY NONPAYMENT OF CORPORATE BONUS TAX. — In National Shutter Bar Co. *v.* Zimmerman & Co., 73 Atl. Rep. 19, the Maryland Court of Appeals holds that a corporation which had not paid the bonus tax required by a statute of that State until after the publication of an alleged libel against the corporation, had no standing in court in an action to recover damages against the publisher of the libel. The provision of the statute that no corporation of the described classes shall have or exercise any corporate power until the required bonus tax has been paid, is held to make the payment of the tax a condition precedent to corporate existence. Another statute providing that no certificate of incorporation shall be declared void for formal defects merely, and that where an effort has been made in good faith to form a corporation, neither party to any transaction with it shall deny the legality of its incorporation, is held not to apply to save the corporate existence and enable it to maintain its action where through indifference or neglect the bonus tax had not been paid. It is also held that the fact that the defendants had directed letters to the plaintiff as a corporation, had referred other persons to it as such, and had procured the bringing of an action against it as a corporation, did not estop the defendants from setting up the defense that at the time of the publication complained of the plaintiff had no corporate existence by reason of the nonpayment of its bonus.

CONTEMPT OF FEDERAL SUPREME COURT BY LYNCHING PRISONER PENDING HIS APPEAL. — United States *v.* Shipp *et al.*, 29 Sup. Ct. Rep. 637, was an information filed before the United States Supreme Court charging the sheriff and jailer of a Tennessee county and divers private citizens with a contempt of that court in failing to protect from mob violence, and in lynching, a negro prisoner who had been sentenced to death by a State

court and who, after the federal Supreme Court had allowed his appeal in habeas corpus proceedings and had ordered a stay of the execution of the sentence, was taken from the jail by a mob and lynched. The lynching was actuated by the intent to avoid the delay attendant upon the appeal. It was held that the sheriff and jailer in failing to make any preparation to prevent the lynching, although mob violence was reasonably to be anticipated, and in failing to make any effort to resist the mob, to save the prisoner, or to identify the participants in the crime, were guilty of contempt of the mandate of the Supreme Court. It was also held that the participants in the lynching were guilty of contempt. The evidence is quite voluminous as to the attitude of the sheriff and jailer in respect to the taking of the prisoner from the jail, and Justices Peckham, White, and McKenna dissent from the judgment of conviction, so far as these officers are concerned, on the ground that the evidence is wholly insufficient to show that they had ever entered into any conspiracy to aid the mob and that they were not guilty of a contempt in not resisting or attacking it, up to the point of imperiling their own lives, in a futile attempt to protect the prisoner.

VALIDITY OF COMMITMENT TO INSANE ASYLUM ON ACQUITTAL FOR MURDER ON GROUND OF INSANITY. — In People *v.* Chanler, 117 N. Y. Supp. 322, the notorious Harry K. Thaw seeks by habeas corpus, brought on appeal before the New York Appellate Division Court, Second Department, to have his commitment to the asylum for the criminal insane declared invalid. The commitment was made under a statute providing that "when the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact in their verdict," and that "the court must thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the State lunatic asylum until he becomes sane." A commitment under the statute is final and without right of appeal. The commitment is attacked on the grounds that the finding of the jury is nothing more than that the defendant was insane at the time of the crime; that the commitment can only rest upon the presumption that the insanity continued from the time of the commission of the crime down to the time of commitment; and that the legislature cannot constitutionally empower a court to act on such a presumption or to commit the defendant without notice and opportunity to be heard upon the question of his mental condition at the time the commitment is made. It is held that the statute and the commitment in pursuance thereof are within the valid exercise of the police power of the state and are not open to the objections urged, and that the liberty of the defendant, under constitutional guaranties, is sufficiently protected by his right to institute habeas corpus proceedings to establish his sanity and procure his discharge. Mr. Justice Gaynor is of opinion that the statute is violative of the constitutional rights of the person committed, and files a dissenting opinion.

LIABILITY OF GARAGE KEEPER FOR ALLOWING AUTOMOBILE TO BE TAKEN OUT BY OWNER'S CHAUFFEUR CONTRARY TO CONTRACT WITH OWNER. — In Wilson *v.* Wyckoff, Church, & Partridge, 117 N. Y. Supp. 783, the First Department of the New York Appellate Division Court held that a contract by a corporation maintaining a garage for the care and storage of automobiles, that a machine placed in its care should not be taken out after night without a written order from the owner, rendered the garage company liable to the owner for the act of the latter's chauffeur in taking the machine out without such order. The question was whether there was evidence of negligence on the part of the garage company such as would render it liable as bailee. The chauffeurs necessarily had access to the garage and to their various machines for the purpose of oiling, testing the engine, and the like. It appeared that during the rush hours when other machines were being taken out the chauffeur of the owner of the machine in question started the engine and got into the machine. He was observed by the watchman at the door to come up quickly behind an outgoing machine, and although the watchman held up his hand and shouted to him to produce the order to take out the machine, the chauffeur put on speed, dashed through the doorway and was out of sight almost immediately. The majority of the court held that upon the evidence the question of the garage company's negligence in failing to adopt sufficient measures to prevent the taking out of machines at rush hours was for the jury. Justices Houghton and Loughlin dissent on the ground that the garage company had a right to assume that the owner's chauffeur was reasonably honest and faithful, that it did not insure that the chauffeur would not by trick or theft take the machine out, and that the evidence of negligence was insufficient to go to the jury.

CONSTITUTIONALITY OF STATUTE REQUIRING EMPLOYER TO GIVE DISCHARGED EMPLOYEE WRITTEN STATEMENT OF CAUSE OF DISCHARGE. — In Atchison, etc., R. Co. *v.* Brown, 102 Pac. Rep. 459, the Kansas Supreme Court holds that the statute of that State requiring an employer of labor to furnish to a discharged employee, upon request therefor, a writing stating the true cause and reason for such discharge is repugnant to the section of the Kansas bill of rights which provides that "all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right," and an interference with the personal liberty guaranteed to every citizen by the State and Federal Constitutions. The court after declaring that only the employee and the prospective employer can have an interest in the matter and that the general public is in no wise concerned, says: "The mere matter of time requisite to comply with the requirement of the statute is perhaps a matter of trifling consideration, yet, if the state may compel the sacrifice of a few minutes of the time of one person for another, may it not compel the sacrifice of a few days of time? Where and upon what principle shall the limit be placed? Again, if the employer can be compelled to state the true cause of discharge, it implies that he should state the facts as he understands them, and the facts may be in dispute and may be regarded by the employee as libelous. Litigation may result therefrom which might be a great burden to the employer, although successfully defended. We think the state can impose no such possible burden. As in many other relations in life the employer may be silent and be safe, or, at his option, he may be courteous and fulfill his moral obligation. It is a personal privilege."

News of the Profession.

THE AMERICAN BAR ASSOCIATION met in Detroit on August 24, 25, 26, and 27. An account of the proceedings will be given in this column next month.

JUDGESHIPS IN SASKATCHEWAN AND ALBERTA. — Rearrangement of judgeships in Alberta and Saskatchewan has been found necessary. J. F. Maclean remains district judge of Battleford, Sask. W. A. D. Lees has been appointed district judge of the District of Wetaskiwin, Alta., as successor to J. C. Noel, who is transferred to Athabasca, a new district. F. A. G. Ouseley is appointed district judge of Moose Jaw, a new district.

THE NORTH DAKOTA BAR ASSOCIATION held its tenth annual meeting at Minot on August 12 and 13. An account of the proceedings will be given in this column next month.

A NICE FEE. — Joseph Martin, a Brooklyn lawyer, recently received a fee of $165,794.47 for recovering a judgment for $1,687,068.65 on some bonds of the Wasatch & Jordan Valley Railroad Co., of Utah.

BATSON SUCCEEDS JUDGE FIELD. — Governor Willson, of Kentucky, on August 2 appointed Homer W. Batson to succeed the late Judge Emmet Field as judge of the Jefferson Circuit Court, Common Pleas, First Division.

DISTINGUISHED SOUTH CAROLINIAN GONE. — Joshua Hilary Hudson, ex-president of the South Carolina State Bar Association, and one of the most eminent lawyers and citizens of that State, died in Greenville, S. C., on July 22, of Bright's disease.

PROMINENT COLORADO ATTORNEY DIES. — Edwin A. Ballard, a prominent member of the Colorado bar, died at his home in Fort Collins, Colo., on July 19, at the age of seventy-two. Mr. Ballard was a native of Ohio and first went west in 1878.

IOWA JUDGE RESIGNS — HIS SUCCESSOR. — Hon. J. H. Rothrock, judge of the Cedar Rapids, Ia., superior court, retired from the bench on August 1, and removed to New York city, where he has begun the practice of the law. Governor Carroll has appointed Charles B. Robbins to succeed him.

DEATH OF EMINENT CONNECTICUT LAWYER. — Goodwin Stoddard, one of the ablest and best known lawyers in Connecticut, died at his home in Bridgeport on July 26 at the age of sixty-two years. He was a graduate of the Albany Law School and was admitted to the bar in both New York and Connecticut before he attained his majority.

WOMEN LAWYERS OF OHIO TO ORGANIZE. — A movement for the formation of a Woman's State Bar Association of Ohio was recently set on foot in Cincinnati by Miss Nellie Robinson, of that city, and Misses Ella Purcell and H. A. Quinby, of Columbus. It was decided to call a meeting this fall at Columbus of all the women lawyers in the State, who number twenty-five.

KENTUCKY TO HAVE COLORED BAR ASSOCIATION. — The colored lights of the Kentucky bar have on foot a plan to organize a State Bar Association. The scheme is being promoted by Albert S. White, sixth vice-president of the National Negro Bar Association, who is being aided by J. G. Jones, of Chicago, the president of that organization. It has the indorsement of Booker T. Washington.

JAMES O. TROUP, OF OHIO, DEAD. — James O. Troup, formerly president of the Ohio State Bar Association, and one of the ablest lawyers in that State, died of cancer on July 20 at his home in Bowling Green. Mr. Troup was born in Scotland in 1845, but came to this country when a boy. Mr. Troup was attorney for the Standard Oil Company in northwestern Ohio.

STATE BAR MEETINGS NOT REPORTED. — The annual meetings of the bar associations in the following States were held during August, but details were not obtainable in time for publication in this number: Virginia, at Hot Springs, on August 10 to 12; Wisconsin, at Milwaukee, on August 24 and 25; Michigan, at Detroit, on August 24 to 27. Accounts of these meetings will be given next month.

MICHIGAN'S PROBATE JUDGES MEET. — The annual convention of the Association of Probate Judges of Michigan was held in Muskegon on July 20–22. The following officers were elected: President, Judge Elliott D. Prescott, of Muskegon; vice-president, Judge David Anderson, of Paw Paw; secretary and treasurer, Judge F. H. Williams, of Allegan. Saginaw was chosen as the place for the next meeting.

DEATH OF MASSACHUSETTS JUDGE. — Judge Francis Almon Gaskill, since 1895 a justice of the Massachusetts Superior Court, died on July 16 at Yorkcliffs, Me., of heart disease. Judge Gaskill was regarded as one of the ablest members of the Massachusetts judiciary and was held in high esteem throughout his State. He was sixty-three years old and was a graduate of Brown University and the Harvard Law School.

FEDERAL JUDGE DIES IN ILLINOIS. — Hon. Solomon H. Bethea, United States district judge for the northern district of Illinois, died on August 3 in Sterling, Ill., aged fifty-five years. Judge Bethea had for many years been a conspicuous figure in Illinois Republican politics. He was appointed United States district attorney at Chicago in 1899 by President McKinley, and in 1905 was appointed to the district judgeship by President Roosevelt.

DEATH OF EMINENT ILLINOIS LAWYER. — William Brown, for many years general counsel for the Chicago and Alton Railway, died at his home in Jacksonville, Ill., on July 24, aged seventy. Mr. Brown was formerly prominent in Democratic politics, having been elected a State senator in 1872, and serving as chairman of the State Democratic Central Committee in 1876. In his office William Jennings Bryan studied law, and at a banquet Mr. Bryan once declared that his preceptor had the finest legal mind with which he had ever come in contact.

TEXAS STATE BAR ASSOCIATION. — The twenty-eighth annual meeting of the Texas State Bar Association was held in Austin on July 6 to 8. The annual address was delivered by Hon. William C. Fitts, former attorney-general of Alabama, whose subject was: "Enforcement of the Law and an Independent Judiciary." Other papers on the programme were: "The Profession of Law as Distinguished from the Business of the Law," by Hon. N. W. Finley, of Dallas; "Inefficiency in the Administration of the Law," by Hon. R. L. Batts, of Austin; "Criminal Laws of the Early Period," by Hon. R. B. Levy, of Texarkana; "Civil Suits Should Be More Speedily Disposed of," by Hon. S. P. Jones, of Marshall.

DISTINGUISHED WEST VIRGINIAN DEAD. — Hon. Daniel B. Lucas, ex-justice of the Supreme Court of West Virginia, and one of the ablest lawyers and most prominent citizens of that commonwealth, died at his home near Charlestown on July 24 at the age of seventy-three. After his graduation from the University of Virginia in 1859 he practiced law in his home town until the outbreak of the civil war. Since the termination of that conflict, with the exception of a brief period when he edited a newspaper in Baltimore called the Southern Metropolis, his activities had been devoted to the practice of his profession and the public service of his State. He was twice elected to the State legislature and in 1887 was appointed United States senator. In 1889 he was appointed to the West Virginia Supreme Court to fill the vacancy caused by the death of Judge Thomas C. Green.

MISSING LAWYER FOUND. — Ex-Judge Joseph R. Clarkson, who on July 14 disappeared from his home in Kenosha, Wis., during a lapse of memory, was found safe and well on August 6 at Sabula, Ia., by John Burns, a friend. He was working in a button factory. Eighteen years ago, while he was judge of the District Court at Omaha, Neb., Judge Clarkson disappeared in a similar manner and was missing for four months. He was eventually found working in a lumber yard but a few miles from the place where he was recently found. After his return to Omaha he could remember nothing of the weeks during which he was walking about the country. Judge Clarkson's malady, it is stated, takes the form of an irresistible desire to perform manual labor. Since his return to Kenosha he has dissolved his partnership with Robert B. Baker, abandoned the practice of the law, and taken a place as a workman with a manufacturing firm.

MINNESOTA STATE BAR ASSOCIATION. — The annual meeting of the Minnesota State Bar Association was held in Minneapolis on July 14 and 15. President Pierce Butler, of St. Paul, called the meeting to order, and after his opening remarks Judge Daniel Fish, of Minneapolis, delivered an address on "The Legal Aspects of the Lincoln and Douglas Debates." After transacting routine business and adopting the American Bar Association's code of ethics, the lawyers adjourned and devoted the afternoon to a trip to Lake Minnetonka. The programme for the second day included a paper by Frank B. Kellogg, of St. Paul, on "The Law's Delay," and one by federal Judge C. A. Willard on "Courts of Justice in the Philippines." In the afternoon the members of the association toured the city in automobiles, and in the evening the annual banquet was held, John I. Baxter acting as toastmaster. Responses were made by Vice-president J. D. Shearer; Justice E. A. Jaggard, of the State Supreme Court; Warren E. Greene, of Duluth; Justice C. B. Elliott, and Thomas D. O'Brien, of St. Paul. The following officers were elected for the ensuing term: President, Lafayette French, of Austin; vice-president, J. D. Shearer, of Minneapolis; secretary, Charles W. Farnham, of St. Paul; treasurer, Royal A. Stone, of St. Paul.

WASHINGTON STATE BAR ASSOCIATION. — The annual meeting of the Washington State Bar Association was held in Aberdeen on July 29, 30, and 31, with President J. B. Bridges in the chair. Since the ventilation of the scandal which caused the resignation of Judge Root from the State Supreme Court the legal profession of Washington has been in a state of fermentation, and the prevailing unrest was markedly in evidence in the proceedings of the association. The air was full of investigations and disbarment proceedings. President Bridges, in his address, made a plea for the general uplift of the moral and ethical standards of the profession, and a large proportion of the time of the association was devoted to the consideration of charges against Judge Root, Judge M. J. Gordon, Herbert N. De Wolf, of Tacoma, and Judge John B. Yakey, of the Kitsap county Superior Court. However, no tangible results seem to have been reached in any case. The papers on the programme were as follows: "Tendencies of Modern Legislation," by Oscar Cain, of Walla Walla; "Courts of Canada," by Robert Cassidy, K. C., of Vancouver, B. C.; "Due Process of Law in Connection with Railroad Freight Regulations," by W. W. Colton, of Portland; "The Lawyer and His Relation to the Courts," by James E. Budd, of Lewiston, Idaho. The following officers were elected: President, C. C. Gase, of Walla Walla; secretary, C. Will Shaffer, of Olympia; treasurer, Arthur Remsen, of Olympia. The next meeting is to be held in Bellingham.

COMMERCIAL LAW LEAGUE MEETING. — The nineteenth annual meeting of the Commercial Law League of America was held at Narragansett Pier, R. I., on July 19 and 22. After the meeting had been called to order by President George M. Napier, of Atlanta, Ga., Congressman William P. Sheffield, Jr., delivered an address of welcome on behalf of the Rhode Island bar, which was responded to by Edwin A. Kranthoff, of Kansas City, Mo. The president then delivered his annual address, and the rest of the first day was devoted to routine business, ending up with a reception and dance in the evening. The principal feature of the second day was an address by G. Grosvener Dawe, managing director of the Southern Commercial Congress, on "National Resources and Legislative Provision." Other papers read during the morning were: "Uniformity of Legislation," by Amasa M. Eaton, of Providence, R. I.; "Notable Laws and Amendments to Laws Passed by Congress and State Legislatures during the Year Relating to Commercial Practice," by Joseph Madden, of Keene, N. H.; "Uniform Foreign Corporation Laws," by Franklin M. Wagner, of New York city. At the afternoon session United States District Judge Robert W. Archibald, of Scranton, Pa., read a paper dealing with frauds and preferences in bankruptcy. In the evening the annual ball was held in the Mathewson House. The business sessions of the third day were devoted to discussions and papers regarding improvements in methods for practicing commercial law and ways in which the practice can be developed. The most notable event of the day was an address by Hon. Ormsby McHarg, assistant secretary of commerce and labor. In the afternoon there was a garden party, and in the evening the annual banquet was held. The brief programme for the final day included nothing of general interest and was quickly disposed of. The officers chosen for the ensuing year were as follows: President, Henry Deutsch, of Minneapolis; vice-presidents, Matthew A. Hall, of Omaha; Joseph Madden, of Keene, N. H.; Edward E. Donnelly, of Bloomington, Ill.; recording secretary, Rowland J. Cleland, of Grand Rapids, Mich.; treasurer, William O. Hart, of New Orleans.

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English Notes.

THE LONG VACATION. — On Saturday, July 31, the English courts closed for the Long Vacation and will not reconvene until October 11. In addition the courts take three other vacations during the year, which total seven weeks. The annual complaints which make their appearance about this time seem to be somewhat more than usually vehement this year, owing no doubt to the fact that the courts are sadly behind with their work.

LAW SOCIETY MEETING. — The annual general meeting of the Law Society, an organization of solicitors, corresponding in some respects to the State and National Bar Associations in the United States, was held in July 9 at the society's hall in Chancery Lane, London. As is usual at these meetings the proceedings related to matters of no general interest. Apparently English lawyers do not care for abstract or speculative topics, for they never — or, at least, hardly ever — soar up into the rarefied atmosphere which is the native element of speakers before similar conventions in this country. The society elected Mr. William Howard Winterbotham to be its president for the ensuing year, and Mr. Henry James Johnson was made vice-president.

THE NEW PREVENTION OF CRIME ACT. — On August 1 the Prevention of Crime Act of 1908 (8 Edw. VII., c. 59) came into operation in England. This statute effects most important changes in the law as to the reformation and punishment of crime. It gives large new powers both to the courts and to the Secretary of State and the Prison Commissioners. Part I. deals with offenders over sixteen and under twenty-one, and gives discretion to the secretary to include offenders under twenty-three. Provision is made for sending such youthful offenders to Borstal institutions where they will be given industrial training, and at the same time be under proper discipline and moral influences.

Part II. deals with preventive detention of habitual criminals. Where a prisoner is found by a jury to be an habitual criminal the court has power to impose, in addition to the sentence for the particular offense of which the accused is convicted, a further sentence ordering the preventive detention of the criminal for not less than five nor more than ten years.

DAMAGE BY SKIDDING OF MOTOR VEHICLE. — From the decision of the Court of Appeal in the case of Wing *v.* London General Omnibus Company, noted in the *Law Journal* for July 24, at page 460, it would appear that proprietors of motor vehicles are not to be held liable for damages caused by their skidding on slippery or greasy pavements where the vehicle is carefully and skilfully operated and the damage is caused by its becoming uncontrollable. In the trial court the jury found that the injury was caused by the defendant's negligence in sending on a greasy road a motor omnibus which was liable to become uncontrollable and did in fact become so. The judge, however, entered judgment for the defendants, notwithstanding the verdict. This was reversed by a divisional court, which has now been reversed in turn by the Court of Appeal. Lord Justice Buckley disagreed with his brethren, holding that when a vehicle which usually confines itself to the roadway mounts the sidewalk without any fault on the driver's part, there is evidence of negligence in allowing it to run at all.

THE LAW OF AVIATION. — In a recent number the *Law Times* says editorially: "M. Bleriot's epoch-making feat in crossing the Channel has, perhaps, its chief interest in scientific and engineering matters such as fall outside the scope of a legal journal, but it does not end there. We have shown in previous comments on aviation that the subject is one upon which Continental lawyers have been thinking and writing for some time, and in France a legal authority has gone further by actually taking part himself in the sport. On the Continent the possibilities of very acute legal questions arising out of aviators crossing frontier lines have received considerable attention, and, now that M. Bleriot has shown that the Channel is not an insuperable barrier, these same questions are brought considerably nearer the range of our own practical politics. It is, moreover, necessary to remember that ballooning as a semi-scientific and semi-sporting occupation is becoming no less a real and permanent feature of modern life than was motoring a few years ago. Most of us will probably have some personal friend who makes regular ascents. He would be a bold man who would venture to assert that the air vehicle in a few years could not become almost as commonplace as the motor car of to-day. It would be well for our legal luminaries to bethink them early as to the existing law in its application to totally new circumstances. What doctrines are to govern trespasses over private lands on the part of balloonists, and what would be the position if some French sportsman, landing on English soil, does damage to property and sails back to France? Are we to apply to airships, by some international agreement, some such regulations as govern marine ships? It would be easy to multiply problems in regard to aviation. The grievances which have been alleged against motors will be insignificant when compared to the perils attendant on careless handling of articles in balloons above streets and houses. M. Bleriot's feat, then, should do something to startle lawyers into considering betimes the rapid developments in aërial flight, and should induce the authorities to see to it that our legal system is capable of dealing fairly with its circumstances. Proper attention given now, before something happens to necessitate precipitate action, may insure that this country's progress in aëronautics will not be hampered, as was its progress in motor mechanics, by legislation entirely unsuited to the novel surroundings."

Obiter Dicta.

A MILD CONTROVERSY. — A real gentlemanly sounding case is Fudge *v.* Durn, 51 Mo. 264.

TOO MUCH BREEDING, MAYBE. — A correspondent calls attention to the fact that Breedlove *v.* Breedlove, 61 N. E. Rep. 797, was a divorce case.

PERHAPS. — "If there is a bar association in New York it should transact some business when the Thaw case is finished." — *Chicago Tribune.*

A HANDICAP. — In Iowa there is a law firm styled Fee & Fee. Aside from its hopelessly obvious utility for punning purposes, such a firm name cannot but have a depressing effect on clients.

GETTING EVEN. — It is told of a Boston lawyer that on his return recently from a day's fishing he had nothing to show except a mud turtle. When asked why he had brought that, the lawyer replied somewhat testily: "He stole my hook. I'm going to make the son of a gun walk back."

HE ALWAYS BRINGS HOME THE MONEY. — In the case of Booze *v.* Yazoo City, (Miss.) 48 So. Rep. 820, Booze was convicted on a charge of unlawfully selling intoxicating liquor. The Mississippi Supreme Court, however, came to the rescue and the judgment against Booze was reversed.

ANOTHER TONGUE TWISTER. — Our request of a few months ago that somebody would tell us how to pronounce the name of the defendant in Peter *v.* D'd-cock, 112 N. Y. S. 1143, has as yet evoked no satisfactory results. An Alabama friend writes to ask that, if we find a pronouncer equal to that emergency, we will next engage his energies on Thompson *v.* Damskibsaktieselskabet Habil, 135 Ala. 249.

JUSTIFIABLE LARCENY. — A young lawyer in a Kansas town, who had been appointed by the court to defend a prisoner charged with larceny, closed his argument to the jury as follows: "Gentlemen, this man is innocent. He only stole the money to go to Joplin on a skylark. He's young and will not do it again. I hope your verdict will be one of acquittal." Nevertheless the jury convicted the accused.

AN EQUITABLE DEFENSE. — In the Springfield, Mass., police court recently a prisoner who had been sentenced to thirty days' imprisonment for intoxication arose and in firm and determined tones announced that nothing could induce him to accept the sentence. In some amazement the judge asked him his reason for taking such a peculiar stand in the matter. "Well, your honor," said the prisoner, "it's this way. The jail is all right as jails go, but for the past three years I've spent most of my time there, and I'm plumb sick of the place." The judge, being

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a man of ripe judgment and rare discrimination, appreciated the force of the prisoner's contention and thereupon suspended judgment.

THE FACTS IN THE CASE. — The following letter was received by a Georgia judge from a deaf and dumb negro held in jail on a charge of burglary:

DALLAS GA. *Nov.* 18*th* 08.

Dear Sir:

GUDGE EDWARDS.

Buchman, Ga.

Please you will tell me how that my bond charge. I will tell that agent dont ask for me that my owning. But I missed my fooled. The agent is a story for me. That I confess that I was broken any window. I dont touch nor steal this office. The agent will give my burglary. That I not this become this broken. I want any crime against for it. Did Mr. Baber tell you about me. Please you tell me, to-day. If you know to charge my bond is fine, but we will can pay more than a hundred dollars. I have any trouble and dont get crime. I that you will can send it to me. I will hear that you is all right. Any office of court dont answer for me. I dont write any crime against. But I will need. Tell Mr. Furr to send it to me when I will payment. I havent any debts. If I dont care to stay throught this summer. I am a Deaf and Dumb. I am in Prison. Please you tell me whom it conerct. Neh. Evans.

In care of Mr. A. Furr.

A ROLAND FOR HIS OLIVER. — A correspondent writes from Fayetteville, N. C.: Not many years ago there lived in this city a Jewish merchandise broker who did a large business for his New York house. On one occasion the firm he represented drew at sight for a considerable balance then due on account, mailing the usual statement of account to the broker, with this notice written at the bottom of the statement:

"Dear Sir:
As the above account
Is now past due,
I take the liberty
Of drawing on you."

Times were too dull and money too tight with the broker to meet the draft just then, but noting the rhyme of the words of the notice at the bottom of the statement, he was resolved not to be outdone in poetic expression, even if he couldn't pay the draft, so calling for the draft at the bank which presented it, he indorsed on the back of it the following:

"Dear Sir:
As times down here
Are now very slack,
I take the liberty
Of sending this back."

As proof that such genius was not unappreciated, the house readily granted an extension of thirty days without interest on the account.

NEW USE FOR HABEAS CORPUS. — Down in Atlanta, Ga., there has recently been issued what is believed to be the only writ of habeas corpus ever sued out to secure the release of a dog. The captive, which answers with more or less alacrity to the name of Wilbur, was being detained as a witness against one William Webb, a negro, who was charged with a criminal assault upon a young white woman. The victim of the assault identified the dog as one that was with her assailant, and it was ordered locked up in the hope that it would turn State's evidence and identify Webb on the trial. Grace Davis, a friend of Webb, claiming to be the true and rightful owner of the incarcerated canine, secured the services of a lawyer who filed a petition for a writ of habeas corpus, alleging that Grace Davis was a "female of the genus Africanus," that she was the owner of the dog, and that the sheriff illegally and unlawfully restrained the dog of his liberty by means of a hempen rope and tied one end to a bar. The writ was granted by the ordinary of the county, but we are not informed as to the outcome of the proceeding.

FRENCH LAW. — Apparently some queer cases come up for decision in the French courts. Not long since a couple of butchers were brought before the Tribunal Correctionnel at Lyons on a charge of stealing cold. One of the defendants had hired a refrigerator from a company which makes a business of sup-

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plying refrigeration for a consideration. The hirer permitted the other butcher to keep meat in the refrigerator, and the company, learning of this, cited the two butchers before the tribunal. The court held, however, that the contract was for the refrigerator and not for the cold which it contained, and that the hirer had a right to use the apparatus as he pleased. About the same time the Tribunal Correctionnel at Rouen was called on to decide whether laughing at a person constituted the crime of "outrage by gesture." M. Chocqueel, it seems, had committed this grave offense against M. Bucheton, a magistrate, while the latter was in discharge of his duty. In fact M. Bucheton testified that the defendant "turned round, laughed, looked me up and down, and affected an air of scorn." The defendant produced evidence that at the time of the alleged crime he was telling a humorous story to a friend and that on observing the magistrate he remarked, "Here's our friend again," after which he proceeded to laugh — at the story, not the magistrate. Maître Dieusy, for the defense, waxed extremely eloquent. He declared that he could hardly speak of the charge with calmness. He had not the honor of knowing M. Bucheton, but he assured the court, should he ever see that gentleman in Rouen, he should not content himself with crossing the road to avoid him — he should take another street. All this, however, availed the defendant naught, for he was found guilty and sentenced to a month's imprisonment.

HORSE AND HORSE. — The following is a copy of an answer filed in a suit tried several years ago before a justice of the peace in the village of Clinton, N. Y.:

In Justices' Court, before A. L. Easingwood, Justice of the Peace.

Russell Kilbourne *vs.* William Harrington.

The defendant, for an answer to the plaintiff's complaint, alleges:

First: He denies each and every allegation of the complaint.

Second: The defendant further answering alleges that at the time stated in the complaint he had a business transaction with the plaintiff, familiarly known as a "horse trade," in which, after the usual preliminaries, representations, and counter-representations by both parties, concerning the qualities, disposition, merits, etc., of their respective animals accompanying a deal of that kind, a mutual even swap of quadrupeds, tail for tail, was made by the parties.

Third: This defendant expressly denies that he defrauded the plaintiff in any manner whatsoever, and affirmatively alleges that the plaintiff is a man of austere manner, grave dignity, and puritanical piety in appearance, apparently unfamiliar with the wiles of a horse-trader, but beneath this suave and fair exterior lurk all the combined arts of a Yorkshire jockey and a David Harum.

That the plaintiff represented and stated to this defendant at the time of the aforesaid business transaction, that his, plaintiff's, horse was sound in limb, wind, and pizzle, a good, safe, kind, susceptible, and gentle driver in any spot, locality, or place.

That notwithstanding the fact that plaintiff's said horse was possessed of eyes like those of a panther at bay, and consequently provoked a specific inquiry on the part of the defendant as to his viciousness, the said plaintiff by the arts aforesaid allayed all of this defendant's suspicions in that line by suavely stating to this defendant that said horse was kind, gentle, and agreeable as aforesaid.

That relying upon and believing such statements so made by the plaintiff this defendant was induced to and did waive all boot money he had theretofore in the preliminary stages of said transaction demanded of the plaintiff, and made an even swap of quadrupeds with plaintiff, tail for tail,, as aforesaid.

That in truth and in fact plaintiff's said horse is and always has been a vicious, confirmed, unbreakable runaway beast, and has strewn the highway from Clinton to Utica with the wrecks and victims of his said vicious habit;

Whereas this defendant's said horse was sound, kind, gentle, and amiable, having only an affection of the eyes, which was plainly observable by any man or beast, *other than said horse himself*, and was worth much more than the runaway wagon-wrecker and man-killer which this defendant in the aforesaid transaction got of the plaintiff.

Wherefore, defendant demands judgment in all things ratifying and confirming said deal and horse-trade, and that he have judgment for costs against the plaintiff.

WILLIAM HARRINGTON, *Defendant.*
By D. E. POWERS, *his attorney.*

The jury returned a verdict for the defendant. Incidentally, it may be of interest to know that the horse traded by the defendant was totally blind.

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Law Notes

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Reforming the Law and the Courts.

JUDGE HIRAM T. GILBERT at the meeting of the Illinois Bar Association this summer arraigned the legal profession for doing so little to advance the law. The members of other learned professions were constantly making real improvements in the fields to which they devoted their lives and energies. The lawyers for a century had sat supinely by and permitted the legal field to improve itself as it could, with the general result that the field was in a shocking state of cultivation, and the tares of technicality and delay had almost choked out the tender plants of speedy justice. Judge Gilbert's remarks were widely copied in the newspapers of the country, and, at the disheartening revelations, many were the sad headshakings of editors who were not infrequently so kind as to hint to the legal profession how reforms might be accomplished. Why the lawyers have not had time to attend to such matters may be gathered from the eloquent address of Colonel J. Hamilton Lewis to the American Bar Association. The lawyer was earnestly battling with more important matters even than the improvement of procedure. At the risk of poverty he was upholding law and justice, just as it was and without any reformers' frills, in the face of angry mobs, or he was saving the Constitution from the "chaos of ambitious frenzied fury."

But the Colonel's eloquence must speak in his own sounding periods. "It was the lawyer who scorned the popularity of the crowd to oppose mob violence and in its place substituted security of property and safety of life. It was the lawyer who exposed home, life, and children to penury, had resentful financial powers or vengeful numbers been able to defeat and dishonor him in his efforts to maintain the law and secure its justice." And again: "It was the American lawyer who seized the Constitution from the late chaos of ambitious frenzied fury and, holding it aloft, denounced the pretensions of ruling tyranny of state and nation, and proclaimed that no man's political aims on the one hand or mad dreams of sovereign divinity on the other should ever supplant the decrees of our fathers and implant the despotism of personal pleasure to the death of laws and the destruction of liberty." Truly the lawyer, instead of blushing for himself and his brethren, may, thanks to Colonel Lewis, hold up his head once more and look the country in the face with proud and serene gaze.

It is an era of reform, however, and the various associations of lawyers are making it hum, as did the Chicago millionaire who went in for culture.

A committee of the American Bar Association, going to the roots of things on paper, has devised a beautiful system of courts which will cause surcease of all legal delay and put the weary litigant at rest. It is woven with the colors of the rainbow, and, like the rainbow, it seems to touch the ground only in Utopia. After pondering for two years, the committee produces this practical plan: "The whole judicial power of each State, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments, or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records and the like, thus obviating expense to litigants and cost to the public. This court should have three chief branches — county courts, including municipal courts, a superior court of first instance, and a single ultimate court of appeal. All judges should be judges of the whole court, assigned to some branch or locality, but eligible and liable to sit in any other branch when called upon to do so. Supervision of the business administration of the whole court should be committed to some high officer of the court, who would be responsible for failure to utilize the judicial power of the State effectively."

But all this is not to be accomplished in a day. It is only the "eventual" goal, the culmination of a "gradual but sweeping reform in judicial procedure." Of course the "eventual" goal can only be reached in most States by radical constitutional changes, but this will not deter a conscientious and thoroughgoing legal reform.

As distinguished from the doctrinaire, the practical reformer of every kind builds on the already existing institutions around him. It is useless to expect a people to abandon familiar things, the result of a long evolution, to embark on a course of untried experiment. The whole thing is not unlike the beautiful paper constitutions which the Abbé Sieyès produced so plentifully during the French revolution.

Improving the Preparation for Law.

THE report of the Committee on Admissions to the Bar in the current Year Book of the New York County Lawyers' Association is a thorough and suggestive piece of work, dealing with a number of current problems regarding preparation for the legal profession, and the duties of the lawyer who has entered upon his life work. The report is signed by Mr. John R. Dos Passos, the chairman of the committee. With many of the conclusions reached

we confess ourselves unable to agree, but others are admirable, and all show earnest and intelligent reflection based on extensive familiarity with existing conditions.

The report is summed up in the following recommendations:

"A full preliminary examination of each applicant under the direction of the Board of Regents; the lengthening of the term of legal apprenticeship from three to five years; the establishment of a fixed or permanent curriculum of study; the institution of fixed methods to be followed by the committees which pass upon the moral character of the candidates, and the abolition of rules by which lawyers from other States can be admitted to the bar by motion upon the mere production of a certificate, the abolition placing such applicants on the same plane as residential candidates except in extraordinary instances sanctioned by special order of the Appellate Division."

The carrying out of all of these proposals would unquestionably raise the standard of the legal profession, but some of them seem rather drastic. To add at once two years to the prescribed period of preparation for law and to require, as appears from another part of the report, two and a half years of that time to be spent "serving a regular clerkship in the office of a practicing attorney of the Supreme Court," appears to be a too sudden break with present conditions. "The fixed curriculum" suggested is divided into two parts, "a preliminary curriculum" and "a special curriculum." In regard to the special curriculum there is not much room for difference of opinion, but we confess not to be impressed with the desirability of reading all of the "institutional" works of Blackstone, Kent, Stephen, and Walker. The student would weary himself with a vast mass of repetition and would be kept unnecessarily from the more fruitful study of special topics pursued in connection with a study of cases. (We note that our curriculum relegates to a special topic, "XIV. The Study of Selected Cases in Law and Equity.") The course, too, absolutely ignores the historical study of law, which has been making such vast strides in recent years, and which, judiciously pursued, sheds such a clarifying light on the law as it exists to-day. Such books as Pollock and Maitland's History, Holdsworth's History, Holmes's Common Law, Street's Foundations of Legal Liability, and the solid and in parts fascinating volumes of "Essays in Anglo-American Legal History" would do far more to help the student than a continued perusal of many "institutional" books. Not that we should recommend the study of all the books mentioned, for there is here too a great deal of duplication. Nor ought a modern and philosophic view of the whole field of jurisprudence such as is presented in Holland's Jurisprudence to be neglected in favor of interminable reading of ancient institutes.

It is worthy of remark that in the "preliminary" course — Moral and Political Philosophy; The Nature and Object of the Law; The Nature and Duties of Citizenship and of a Legislator; The Mission, Functions, and Duties of a Lawyer — no book is thought worthy of study which is later than the eighteenth century. We have Rousseau and Bentham, Montesquieu and Blackstone, Paley and Cicero, which, we submit, would leave the student with rather an antiquated notion of the state of human thought on several of the topics mentioned.

Written to Be Supplemented by Oral Examinations.

A RECOMMENDATION which should receive hearty approval is that candidates for the bar should be subjected to an oral as well as a written examination. Upon this subject the report says:

"A principal objection to the present system is that there is no oral examination of the candidates. There is no opportunity for the examining board to judge of the general make-up of applicants or of their ability, orally, to explain the nature of the profession which they seek to enter, or of the principles of law. Readiness and versatility show mental development, and are no small portion of a legal education. Oral questioning operates as an incitation to ambition; it brings to the surface many qualities which rest inert without it; the oral examination arouses the candidates to exert themselves to pass creditably before the eyes of their associates. Such an examination is conducted with the object of testing the mental readiness and address and legal learning of the candidates; one question leads to another, and one subject opens a different branch of the law, until a substantial interrogation soon develops the capacity of the candidate. It seems to us, when properly and fully conducted, an oral examination becomes indispensable to test the sufficiency of the student's qualifications. Full allowances can be made for nervousness on the part of the candidates, and the written examination will always be consulted when the final decision as to the qualification of the student is made."

Of the defects of the present system it is remarked: "The written examination, as now framed, is largely a mere test of memory. It covers a field of subjects embraced within the two groups mentioned below, involving the solution of many supposititious cases, where good sense or quick perception, often supplies technical knowledge. These questions have been from time to time preserved and are now actually published in a separate book, so that all students browse over the fields so often covered by their predecessors, and know the general course of examination to which they will be subjected. The whole examination then becomes one of mental dexterity, and of cramming for the final test."

Purely written examinations do well enough, perhaps, in the schools where they follow a prolonged course of oral instruction, but the objections so well stated in the report are fundamental, and apply with particular force where the examiner meets the candidates without any previous acquaintance with them or their methods of thought.

Divorce in England.

THE English Parliament has recently been considering the present state of the divorce laws, and the discussion is summed up by Sydney Brooks in *Harper's Weekly* has shown a situation which would not be tolerated in any State of this country. It will be remembered that before 1857 the only divorce obtainable in England was by Act of Parliament. Under this system divorce was a luxury for the wealthy; for poor persons, no matter how aggravated the facts might be, could not afford the great expense involved in the preliminary litigation, and the obtaining of a private Act of Parliament. In 1857, however, a divorce court was established to sit in London, and was empowered to grant divorces for the adultery of the wife,

and for the adultery and cruelty or desertion of the husband. Even under this system divorce is denied to the poorer classes who cannot afford to leave their work, perhaps in some distant part of England, in order to institute a litigation in London, involving an expense of some three hundred dollars at the least. There is still practically, therefore, a glaring inequality between the poor and the well-to-do, which differs only in degree from the days before 1857, and which is fundamentally opposed to our American ideal of equality of opportunity. The poorer classes are yet limited to procuring a legal separation even where the circumstances would permit their richer neighbors to obtain a divorce. And this separation does not, of course, permit of either party remarrying during the life of the other. This state of facts was explained by Lord Gorell, for a long period a judge in the Probate and Divorce Division of the High Court of Justice. Lord Gorrell advocated an extension of the jurisdiction to grant divorces to the local courts throughout England, but the eloquent opposition of the Archbishop of Canterbury has served at least to postpone the measure. The only practical result of the agitation has been the appointment of a royal commission to inquire into and to report upon the practical working of the divorce laws.

The existence in a community of a class of adults who cannot legally marry would have a tendency, one would think, to encourage the formation of illegal connections and so tend to react on the moral ideals of the people. The archbishop denied that the facts substantiated this reasoning, and he produced interesting statistics to prove his assertions. Whether his statistics will bear the investigation of the commission remains to be seen.

The President on Courts and Lawyers.

THE President's Chicago speech was largely devoted to a grave arraignment of American courts and their methods of administering the law, and it comes with especial force from so accomplished a lawyer. Much of the substance of the criticism is more or less familiar to our readers and has been before the public for some time. A striking statement of the same evils was made at least two years ago by Judge Amidon, and created much discussion. How much easier it is to point out the defects of existing institutions than to devise a practical remedy is indicated by the fact that Judge Amidon is on the committee of the American Bar Association which produced the report for the unification of courts noticed above. Before reform is accomplished, however, the people must be awakened to a lively and real sense of the evils of the present condition of things, and surely there can be no more effective way of accomplishing this result than for the President to emphasize the defects of the administration of law in his public utterances.

"There is," said Mr. Taft, "no subject upon which I feel so deeply as upon the necessity for reform in the administration of both civil and criminal law. To sum it all up in one phrase, the difficulty in both is undue delay. It is not too much to say that the administration of criminal law in this country is a disgrace to our civilization, and that the prevalence of crime and fraud, which here is greatly in excess of that in the European countries, is due largely to the failure of the law and its administrators to bring criminals to justice."

He proceeded to contrast English courts and their methods with American. The superior effectiveness of the former and the minimizing of delay there he attributed to the effective control of the courts by the judges, while here, on the other hand, the judge "has hardly more power than the moderator in a religious assembly." The power of the judge has been lessened, however, not only by legislation, but, by reason of our habit of hastening to embody everything worth having in the State constitutions, the principle is embedded in the fundamental law of many States that the judge shall not express any opinion on a question of fact, leaving that for the jury.

But the evil is made greater by the conduct of our lawyers. The President declares that "it is undoubtedly true that in England lawyers in the conduct of their cases feel much more and respect much more their obligation to assist the court in administering justice and restrain themselves from adopting the desperate and extreme methods which American lawyers are even applauded for. The trial here is a game in which the advantage is with the criminal, and if he wins he seems to have the sympathy of a sporting public."

This is a state of things which no one can deny, and it should be a source of humiliation to us.

Advantages of Attendance at a Law School.

DOUBTLESS there are legal-literary men, not connected with law schools, competent to prepare for dissemination by a correspondence school a set of law lectures not inferior in substance to many of the lectures delivered to law school students. But the law school lectures are powerfully reinforced by other and familiar forms of instruction in the class room, while a correspondence school has no class room.

Possession of a large library of reports and text books gives a tremendous advantage to the law schools. Correspondence schools cannot afford to print the most valuable parts of the opinions in reported cases, namely, the *reasons* which controlled the decision of the case — especially those reasons which should constitute more convincing arguments than any founded merely on the rule of *stare decisis*. All these are accessible to the law school student. For example, the printed or typewritten literature of a correspondence school might inform the pupil that entries of cash payments or loans are or are not, as the case may be, admissible in evidence under the shop-book exception to the hearsay rule, and cite the authorities on both sides of the question. What *argument* can be made against the admissibility of an entry in an account book of a payment made on a note? What plausible *reason* is there why such an entry may properly be excluded while entries of goods sold, etc., are properly admitted? A law school student may be directed by the professor to the case of *Inslee* v. *Prall*, 23 N. J. Law 457, 464. Would any correspondence school give to its patrons the reasons stated in that case by Mr. Justice Potts, which were as follows:

"I hold, first, that there is not, and never was, a *necessity* for making books of entry evidence of the payment or the lending of money. There is no such great and overruling amount of inconvenience in requiring that men should take a receipt for money when they pay it, or a note or memorandum for money when they lend it, as that the safe, sound principle of legal evidence should be over-

turned on account of it. It is the ordinary mode in which all careful, prudent men transact such business; and if some men will persist in being careless or imprudent, the rules of law should not be subverted to encourage it or help it. I hold, in the second place, that to permit a man to make his neighbor liable for money paid or lent, by the mere act of writing in his private book of account that he paid or lent it, is in the last degree unsafe, hazardous, and dangerous. It is the easiest thing possible to make such a charge — the hardest thing possible to disprove it. Goods are generally bought and sold in a store, in a shop, often by clerks, frequently in the presence of a third party; they are taken mostly to a man's family, and used there. Services are very generally rendered in public, or there are circumstances which afford some possibility of rebutting fraudulent charges respecting them. But not so with money transactions — they occur at a man's home, in the streets and highways, not in the presence of third parties, perhaps more frequently in private than in public. It can always be safely *alleged* that they so occurred. You may trace goods to their use sometimes, but not money with any certainty. Services generally produce something tangible or visible with which the service was connected, but no man can prove that at a particular time he did not receive money, unless he prove an alibi. The object of the evidence ruled out in this case was to prove the payment of a note, not by indorsements, not by loose receipts, not by witnesses present, not by the acknowledgment of the holder, but by entries of cash paid on account of it, made by the payor from time to time in his private book of accounts. I do not say that these entries were fraudulent; but I do say that a man may very easily pay off his notes and outstanding obligations in this way, if such entries are competent evidence."

We are aware that in some cases book entries of cash paid have been held admissible and reasons have been assigned for so holding. Among such cases is *Ganahl* v. *Shore,* 24 Ga. 17, 24, where Judge Lumpkin said:

"The business of banking is confined almost entirely to money items. So of the books of factors and commission merchants. So of brokers. Large pecuniary advances are made by commission houses to planters, in anticipation of crops. The customer sends an order for a thousand dollars. It is forwarded and charged to the planter's account. True, the factor has the written order, but the cash advance depends upon the evidence of his books. Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now, to allow of the particularity and consequent delay in the obtainment of receipts, etc., which might at one period have prevailed without prejudice. Corporations, the law says, can only act through their corporate seal. Enforce this doctrine now, and all moneyed corporations, at least, would be abolished. They draw and indorse bills, and perform through their cashier, or other official agents, all their functions, the same as individuals. Take the case of a grocery merchant in one of our towns. His customer gives him a verbal order to buy him a thousand pounds of fodder, or ten barrels of corn. It is done, and the money paid out for the produce and charged to the customer's account. When this practice is universal over the State, are the books no evidence of these money items? He that so affirms is a half century behind the age in which he lives. And to get up with it he must forget the things that are behind and press forward, for it will never stop or come back to him. As soon try to roll back the sun in its daily journey, from west to east."

In the second volume of Ames and Smith's "Cases on Torts," published especially for the use of Harvard law students, there is set forth, between reported cases, the text of pages 398–403 of vol. 16 Am. and Eng. Encyc. of Law (1st ed.). We do not see how instructive dissertations on a narrow topic, like the one thus quoted by the Harvard professors, could be profitably printed.

Correspondence Schools of Law.

At the meeting of the American Bar Association in Detroit, last August, Dean Richards of the University of Wisconsin Law School, and James Parker Hall, of the University of Chicago, spoke in disparagement of attempts to give adequate instruction in law by correspondence schools. They maintained that only the regular law schools are justified in claiming that they can qualify students for admission to the bar. There was an animated discussion, which was not all one-sided. Judge Francis M. Danaher, of Albany, N. Y., speaking from his experience as member of a board of examination of candidates for admission to the New York bar, declared that the examination papers of law school graduates frequently revealed astounding ignorance of law, and he argued that judgment should not be pronounced against correspondence schools until the latter have had a longer time for demonstration of their usefulness.

Well, correspondence schools of law have been "abroad in the land" for a good many years, and have issued a vast quantity of literature in exploiting the enterprise, with very satisfactory financial returns to some of the schools, if we are correctly informed. And yet we opine that "Who's Who" will be searched in vain for the name of a lawyer who acquired his professional instruction through a correspondence school; while numerous instances can there be found of lawyers who studied in law schools or law offices or were "self-ed. in law" at a time not antedating the establishment of correspondence schools of law.

In "——, says Mr. Devery," the sententious ex-chief, who never quenched his thirst at the Pierian spring, is quoted as saying: "I tell you there's altogether too much education on fancy lines. There ain't no use fixin' up the hoofs of a horse with a manicure set." Possibly Mr. Devery's observation would apply to the law school graduates whose examination papers shocked Judge Danaher. A few years ago an accomplished New York lawyer complained publicly and with some asperity that many graduates of the academical department of one of our greatest universities were unable to write plain, readable English.

In Re Peary and Cook.

It would be unspeakably presumptuous for a law journal to express an opinion concerning the ultimate fact in controversy between Peary and Cook. Did Cook attain the ninetieth degree of latitude? is a question decidedly not within our province to discuss. But we can speak confidently upon the weight of one item of the testimony which has been credibly reported in the newspapers,

namely, Peary's statement that Cook is flatly contradicted by the two Eskimos who, Cook asserts, reached the Pole with him.

Peary's attitude is one of pronounced hostility to Cook's claim. His disappointment, if Cook has anticipated him, is naturally keen, and he would need to be gifted with almost superhuman attributes in order to have no combative spirit when speaking of his rival's alleged achievement. In passing upon the validity of Cook's claim that he succeeded, any judge would unhesitatingly treat Peary as a biased witness. A slight knowledge of human nature, reinforced by what is disclosed in Peary's dispatches, would forbid the acceptance of his testimony as that of an impartial narrator. Especially would his statements of what was said to him in conversation with the Eskimos be subjected to the closest scrutiny and critical analysis, but without any disposition to adjudge him guilty of intentional falsehood. The learned and sagacious Chancellor Spragge, of the Court of Chancery of Upper Canada, was speaking of a biased witness when he said: "Such a man can be but little depended upon for an accurate and honest statement of facts which passed under his notice; of acts which he saw done; infinitely less can he be depended upon for an accurate and honest statement of what he heard said." *Vannatto* v. *Mitchell,* 13 Grant Ch. (U. C.) 665, 674.

Numberless are the wrong turns that can be given to a conversation by a witness who undertakes to state what was said to him. Judges are fully aware how frequently a conversation is radically altered in its purport by the simple device of refraining to mention all that was said, not only by one of the speakers but by the other. If one party is reported to have said so and so in response to questions, the court will wish to know exactly how the interrogatories were framed, so that what was spoken spontaneously may be distinguished from that which was uttered upon suggestion. Testimony elicited by leading questions, for example, is often rejected by judges as entirely untrustworthy. Now Capt. Amundsen, of Copenhagen, says that Eskimos "reckon out what you want to hear and then speak to please the good white man." Did Peary enable them to "reckon out" what he wanted to hear?

In a case of a contested will where the mental capacity of the testatrix was disputed, one of the attesting witnesses, a reputable lawyer, unquestionably influenced, however, even if unconsciously, by a desire to have the will upheld, testified that when the instrument was executed during the last illness of the testatrix and on the near approach of death, she said to him, among other things, "I hope your mother is well." She was acquainted with his mother, and if the reference to her was made without any prompting, it would indicate memory, intelligence, and alertness of mind, and the witness's testimony did at first cause the court to infer testamentary capacity. But on further examination the witness admitted that he told the testatrix he had seen his mother that morning, who sent her compliments, and that the testatrix had not until then alluded to his mother. "This gives quite a different character to the inquiry," said Sir John Nicholl, before whom the case was tried: "the one account inducing a belief that the inquiry originated with the deceased, the other showing that it grew out of a previous observation, and was such a remark as a person in a state of great imbecility might well make." *Marsh* v. *Tyrrell,* 4 Eng. Eccl. 33, 54.

Peary's report of only one side of his conversation with the Eskimos would be valued close to zero in a judicial tribunal. Unless he adduced corroborating evidence it could not stand for a moment against Cook's assertion of the facts said to have been denied by the Eskimos.

Until further developments, at least, no judge would deem it incumbent on Cook to produce the Eskimos to substantiate his story. Whoever affirms that they did not go with him to the Pole should produce them.

Ex-Justice Brown's Views on Divorce.

MODERATION and sanity characterize the address by ex-Justice Brown on the law and procedure in divorce which is published elsewhere in these columns. It is not extravagant to say that this is the best discussion of the subject which has appeared in print for a long while. It may not meet with the concurrence of those who look upon marriage wholly as a sacrament and believe that those whom God hath joined together shall not be put asunder for any cause whatever, and yet one may believe very strongly in the sanctity of the marriage relation and that it is of the utmost importance that it should be a permanent union, and still unreservedly agree with the views so clearly expressed by the distinguished author.

In the discussion of causes for divorce, the author states seven which are recognized as grounds for divorce in most of the United States, and then says: "Who shall say that the existence of any one of these causes may not strike at the root of the marriage relation, defeat the very object for which it was entered into, and render it a curse instead of a blessing? Who shall say that this practical unanimity of the forty-six States constituting the United States, and of the most highly civilized countries of Europe, should not override the sentimental considerations which oppose themselves to any dissolution of the marriage tie?" This may not be received with favor by those who believe adultery should be the sole ground for divorce, but it will receive the approval of most of those who believe that such matters as the happiness of the parties, the welfare of their children, and the conservation of sexual morality, should be given due consideration when legislation on this subject is enacted. Human nature being as it is, sexual irregularity, with its far-reaching evil consequences, is especially likely to result from making it unreasonably difficult for mismated couples to rid themselves of the bond by which they are legally but only nominally united. We have the example of South Carolina, where not a single divorce has ever been granted for any cause. The legislature of this State has found it wise to enact a law providing that a man shall not will more than one-third of his estate to his concubine.

Remarriage of Divorced Persons.

IN some of the jurisdictions in which divorce may be granted for adultery it is provided that the guilty party shall not be permitted to remarry, or shall not be permitted to remarry for a more or less extended period of time after the granting of a divorce. The learned ex-justice does not give his approval to this restriction, and with reason. Placing a permanent, or extended, prohibition on remar-

riage cannot but have the same effect as not allowing a divorce at all, and thereby preventing the forming of a new marital relation. In either case, a relation approximating that of marriage is often likely to be formed. In his "History of European Morals" Mr. Lecky convincingly shows that in those countries where the laws made it most difficult to contract marriage the bastardy rate was highest, and that there was a decrease in illegitimacy when the laws were changed so as to make it an easier matter to enter into the marriage relation.

Reform in Divorce Procedure.

IN that part of his address which deals with the procedure in divorce cases ex-Justice Brown deals with questions about which there can be little difference of opinion. While it is a practicable impossibility to obtain uniform divorce laws throughout the United States so far as grounds for divorce are concerned, there should be no insuperable obstacle to the enactment of laws regulating the procedure so that there will be an end to the disgraceful practices which have attended, and still attend, the granting of divorces in some parts of the country, and so that a person who has secured a divorce may know that the decree will be valid outside of the jurisdiction in which it was granted. It is probably possible to secure the general enactment of a law dealing with these matters, and the advocates of a uniform divorce law are much more likely to obtain results if they will limit their efforts to this branch of the subject than if they try to secure the general enactment of a law covering the whole subject, including grounds for divorce. And those who are making efforts to obtain this reform in the law will find much of value in Judge Brown's suggestions.

ARE THERE ANY LOST FORENSIC ARTS?

ACCORDING to high authority the art of pleading under the New York Code of Civil Procedure is very nearly in the state of being utterly "lost." In *Lilly* v. *Preferred Accident Ins. Co.*, 41 N. Y. Misc. 8, 83 N. Y. Supp. 585, Mr. Justice Gaynor, of the Supreme Court Appellate Division, said (italics ours): "Nothing which the plaintiff has to show in order to recover has to be pleaded as a 'defense;' and it would be a very foolish defendant who would thus plead it, and thereby acknowledge that the burden was on him to establish it by a preponderance of evidence. The like is often done of late, however, *pleading being a lost art in this State*, except among a few." In *Flack* v. *O'Brien*, 19 N. Y. Misc. 399, 43 N. Y. Supp. 854, the same judge said: "The science of pleading seems to be quite lost in this State. The distinction between a 'denial' and a 'defense' scarcely remains."

Is the art of cross-examination becoming a mere tradition? In 1898, Mr. Justice Patterson, of the New York Appellate Division, addressing the Phi Delta Club, caused a great deal of comment within and without the profession by naming four living New York lawyers as great cross-examiners, and then declaring that the rest of the profession do not know how to cross-examine as did Rufus Choate, Charles O'Conor, James T. Brady, and William F. Fullerton. Of course it would be rash for any one to assert that such a statement made by a judge of Mr. Justice Patterson's standing is utterly groundless. At the present day it is quite likely that most lawyers of the calibre of Rufus Choate and Charles O'Conor are heaping up fortunes as organizers or advisers instead of distinguishing themselves for astuteness in the cross-examination of witnesses. Nowadays they are not so very often seen in the court room trying jury cases. It is only by a great deal of practice that a lawyer can acquire consummate skill as a cross-examiner.

Nevertheless, we think a good many lawyers now practicing at the New York bar and at other bars are the peers of any mentioned by Mr. Justice Patterson as able cross-examiners. Who would not be astonished to hear that Francis L. Wellman had received severe punishment from a witness he was cross-examining, and that the witness actually "got away with it"? Is it conceivable that De Lancey Nicoll, John F. McIntyre, William Travers Jerome, John B. Stanchfield, Martin W. Littleton, Donald T. Warner of Salisbury, Conn., or the late James Huntington of Woodbury, Conn., would have been so incautious as to cross-examine the witness Strachwitz in *Merrill* v. *Grinnell*, 30 N. Y. 594, with the blind folly for which the cross-examiner suffered so terribly in that case — cross-examine a witness upon a bold and confident assumption, without any basis for it, that he is committing perjury? The cross-examiner attempted to show up Strachwitz as a liar, but only succeeded in demonstrating with startling conclusiveness that the tale he had told on direct examination was true. And, strange to say, the cross-examiner was a great New York lawyer, if he was the same lawyer whose name appears in the report of the case in the Court of Appeals.

So many verdicts are set aside nowadays because counsel in argument had recourse to matters prejudicial to the other side, but not in evidence, that there seems to be some ground to suspect that the art of arguing questions of fact forcibly and in a legitimate manner has suffered a decline.

In a case in Vermont against a railroad company, where it was a question whether the bell on the defendant's locomotive was rung just before the plaintiff was injured, servants of the defendant testified that it was rung, and the plaintiff's counsel, now a member of the United States Interstate Commerce Commission, made the following sarcastic and facetious comments in his argument to the jury: "I don't know how many suits in which railroad companies were involved you may have heard tried, but it is a general rule that the bell always rings. There is no case on record in which the bell did not ring. It is the universal rule that the bell always rings. One of the stock questions which a railroad manager asks an applicant for employment is 'Does the bell ring?'" No evidence had been offered tending to show anything about bell ringing on any other occasion, or about any claim being made by the defendant or any other railroad company that a bell was rung on any occasion save the time of this accident; and because of the foregoing insinuation by counsel, unchecked by the court, that the servants had been suborned by the defendant, a new trial was granted. *Magoon* v. *Boston, etc., R. Co.*, 67 Vt. 177, 31 Atl. Rep. 156. In a similar case in New Jersey, where counsel for the plaintiff asked in his argument to the jury, "Are you

going to take the testimony of these railroad employees whose bread and butter is at stake?" the court said counsel should have been required to withdraw the statement, there being no evidence in the cause to justify an assertion that if the witnesses did not testify falsely they would lose their positions. *Minard* v. *West Jersey, etc., R. Co.*, 74 N. J. L. 39, 64 Atl. Rep. 1054. In *St. Louis, etc., R. Co.* v. *Boback*, 71 Ark. 427, 75 S. W. Rep. 473, counsel stated in effect, and as a fact, that if the railroad company's servants whose duty it was to blow the whistle should not testify that it was blown they would be discharged by the company. There was no evidence that this was true, and it was held that the court erred in refusing to sustain an objection to the statement of counsel.

Now, what impresses us is the fact that in the three cases just cited counsel could have made a far more powerful argument without improperly resorting to matters not in evidence, especially if his cross-examination had been conducted with a deliberate purpose of providing him material for a line of argument that he had in mind — and surely a cross-examiner should always have a definite end in view. Suppose, for instance, he had brought out the fact that these servants were married men with families of young children. It ought not then to necessitate profound reflection in order to adduce to the jury good reasons in strong language why those servants would probably strive to testify in such a manner as to favor the interests of the railroad companies. Moreover, counsel might argue that while there is no evidence that a servant would be discharged if his testimony was unsatisfactory, is it unreasonable to suppose that the servant may nevertheless have serious apprehensions if his testimony should cause the officers of the company to scowl when listening to it? See *Illinois, etc., R. Co.* v. *Beebe*, 69 Ill. App. 363, 387. Indeed, a good many other things could be said by counsel, without violating any rule of propriety in argument, that would prevent a jury from precipitately accepting everything the servants stated.

We think it will be found that the great lawyers whose arguments are printed in Howell's State Trials — at least in the later cases, say in the 1800's — never consciously departed a hair's breadth from the evidence. Read, for instance, Sergeant Copley's terrific argument for James Watson, who was tried for high treason in 1817. (32 How. St. Tr. 499 *et seq.*) Being interrupted by the attorney-general, who claimed he was stating facts not in evidence, Copley said: "I declare to God, I do not wish in this cause to state incorrectly the slightest or most trifling circumstance. I conceive that if I pervert a single fact I am weakening the cause of my client, and if I fall into error in this respect, it is because my own recollection does not sufficiently assist me in so long and complicated an inquiry, an inquiry which has now lasted six days. . . . I have not intentionally exaggerated, or given a false coloring to a single fact. If I do so, let me be put right, for I am sure I weaken the cause of my client." Watson was acquitted, much to the disappointment of Lord Chief Justice Ellenborough. Copley was a son of John Singleton Copley, the historical and portrait painter of Boston, where both he and his father were born. Lord Chief Justice Campbell, referring to James Watson's trial, speaks of "the luminous energy of Sergeant Copley, who on this occasion gained the reputation which in rapid succession made him, with universal applause, Chief Justice of Chester, Solicitor and Attorney-General, Master of the Rolls, Lord Chancellor, and Baron Lyndhurst."

Speaking of the fault of traveling out of the record in argument reminds us of an incident of really dramatic interest for the listening lawyers, which occurred on the trial of a case in a Court of Common Pleas in one of the New England States twenty years ago. A lawyer who had recently been appointed a judge — and is now a judge of a court of last resort — found it necessary to sue the Pennsylvania Company for services rendered by him in its behalf on the trial of a case against it. His claim was for $500, and on the first trial the jury gave him a verdict for that amount. But the Supreme Court granted a new trial for certain errors in the admission of evidence. The trial again came on before a jury, the plaintiff testified, and counsel for the defendant proceeded to cross-examine him. In an exasperating tone and with a curled lip, he asked: "Now, judge, do you really think that the services you have described were worth $500?" Herbert Spencer once said in substance that self-possession is a mysterious faculty, mostly of natal origin, and little capable of cultivation. At any rate, although the witness had been for many years a trial lawyer of very exceptional ability, on this occasion he lost his balance. Leaning forward in the witness chair, the eyes of the jury riveted upon him, he replied to his cross-questioner: "Mr. D———, when the jury retired on the last trial, and we were awaiting their verdict, you declared to me that my claim was undoubtedly reasonable, and that you had not advised your client to contest it." Amazement could be read on the countenances of all the lawyers in the court room. Mr. D——— turned to the presiding judge and moved that the jury be discharged. After a noon recess the motion was argued for two or three hours and the judge then discharged the jury. He thought the witness's unwarranted answer had delivered the defendant over to certain defeat, and that no instruction to the jury could neutralize its fatal effect.

We suppose the great number of cases where new trials have been granted because counsel went outside the record in argument are mostly attributable to the impulsive zeal of the advocate in the heat of debate. The numerous reported cases wherein the opinion of the court contains a powerful argument on the facts, strictly confined, of course, to the record, forbid any conclusion that the art of handling questions of fact effectively has become obsolete, for all these judges were once practicing at the bar, and some of them will probably return to it. Take the great case of *Boylan* v. *Meeker*, 28 N. J. Law 274. Judge Vredenburgh's long opinion in that case (from p. 330 to p. 477) is devoted almost entirely to a discussion of questions of fact. We do not think there is another reported case in this country which contains so forcible an argument. Every student in a law school should be required to read it, and observe especially how the distinguished judge in his argument assembled facts in huge and irresistible masses. (See p. 361 *et seq.*) In order to observe how a skilled trier of facts extracts inferences from little circumstances casually appearing in evidence and transfers them for very useful purposes to other parts of the case, the student might profitably read *Vreeland* v. *Vreeland*,

48 N. J. Eq. 56, 67, 21 Atl. Rep. 627, 631, noting Vice-Chancellor Van Fleet's statement that "the defendant lacks neither craft nor greed," and the use he makes of that fact in relation to the evidence discussed just preceding the statement. C. C. M.

THE LAW AND PROCEDURE IN DIVORCE.[1]

THERE is no question connected with the administration of the law so fertile of litigation and so exacting of public attention as that of divorces. Thousands of decided cases have turned upon their validity. Hundreds of articles have appeared in periodicals discussing their propriety. And yet so various are the aspects under which the questions are presented that the subject has lost but little of its interest. The clergy have made them a specialty, and have generally been outspoken in denunciation of their acknowledged evils, and discreetly silent in respect to their utility, ignoring the distinction between the causes for which they may be granted and the procedure by which they are obtained.

The head of the Roman Church in America, a man for whom I have a profound respect, has painted divorce as "a monster, licensed by the laws of Christian states to break hearts, wreck homes, and ruin souls." This is certainly a gruesome picture. Little is gained, however, by an assumption of facts, conjectured but not proven. What one asserts another may with equal propriety deny. The moralists are much divided in opinion, but the voice of the people is largely in favor of liberal laws. The reasons for this diversity of sentiment are not far to seek. They are partly religious and partly social or political, depending principally upon the theory on the one hand that marriage is only a civil contract, and, upon the other, that it is of a sacred character, interference with which must not be permitted by human power.

By the common law, marriages are exclusively civil contracts, and gauged by the ordinary principles applicable to the law of contracts, though ministers of the gospel are made officers of the law for the purpose of solemnizing them. Civil marriages are provided for in most of the Continental states of Europe, though the sanction of the church is frequently solicited in confirmation of the action of the civil authorities. It is, however, as a civil contract that I propose to consider the marriage relation. In legislating in respect to this relation and its dissolution, it can hardly be assumed that the state does not have in view the security of society and the preservation of domestic life, which is the real foundation of the state. The legislature may differ from the church with respect to the means to be adopted for the general good of society, but the views of both are entitled to respectful consideration. That separation of church and state, which is a cardinal principle of American jurisprudence, is nowhere more applicable than in that which concerns the marriage relation. While persons professing allegiance to a particular church may lawfully resort to the civil courts for relief from the matrimonial bond, they have no right to complain if they are thereby subjected to ecclesiastical penalties. Upon the other hand, the state is not justly subject to censure for adopting a course which in its judgment conduces most towards the welfare of its citizens, though its views may differ from those of the church.

By the Greek and Roman churches marriage is regarded as a sacrament — an impressive word of somewhat indefinite meaning, standing generally for something exempt from the control of the civil authority. Hence, in Catholic countries (Roman at least), so long as the church is the controlling political power the marriage tie is indissoluble, except by special dispensation of the Pope, although it may sometimes be annulled for antecedent causes. By the ancient Jewish law, if the wife found no favor in the eyes of her husband "because he hath found some uncleanness in her, then let him write her a bill of divorcement and give it in her hand and send her out of his house." The meaning of the word "uncleanness," better translated in the Revised Version as "some unseemly thing," was so indefinite that a controversy arose at once as to whether it should be confined to acts of indecency, or extended to any reason for which the wife failed to find favor in her husband's eyes. The latter view finally prevailed, though the procedure was made so difficult in obtaining the "get" or bill of divorcement that a judicial procedure was made necessary.

The dissatisfaction with this lax but complicated system finally culminated in the Sermon on the Mount, that "whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery; and whosoever shall marry her who is divorced committeth adultery." The same prohibition is contained in Luke and Mark without the exception. A further prohibition of divorce is supposed to be contained in the declaration that "what, therefore, God hath joined together let no man put asunder," a clause incorporated into the marriage service of most denominations. In both these Gospels the prior law is recognized, and the sayings of Jesus must be treated as new legislation. Exactly in what form the Lord acts in joining together two persons in the bond of matrimony, or whether he be present at all in civil marriage, is a proposition upon which I do not care to enter. It is sufficient to say that the civil courts make no distinction between civil and ecclesiastical marriages in respect to their sanctity.

While marriage is not generally regarded as a sacrament by the Protestant churches, the marriage relation is by many of them treated as indissoluble, or dissoluble only for adultery. This is the position taken by the Church of England, and its congener the Protestant Episcopal Church of America, and by all of them divorces upon nonscriptural grounds are looked upon with disfavor. Indeed, it is difficult to see how those who regard the code of the New Testament as rules of moral conduct applicable at all times and places and under all circumstances, can admit the dissolubility of the marriage tie upon any other ground than that specified in the teachings of Jesus. We respect these convictions if we do not wholly share them.

A like regard was formerly paid to the sayings of the Old Testament, and the most melancholy chapters of the history of the human race turn upon the supposed sanction of the Bible for some of the worst atrocities of the middle ages. That the feeling that even the precepts of the Old Testament are still of binding obligation is not yet extinct is evident from the fact that sixty years were required to induce the British Parliament to overrule the solid opposition of the church to the Deceased Wife's Sister bill — an opposition resting principally upon an obscure passage in Leviticus, which, indeed, seems to permit rather than prohibit such marriages after the death of the first wife. Capital punishment was also supposed to receive the direct sanction of the Almighty from the familiar injunction in Genesis, "whosoever sheddeth man's blood, by man so shall his blood be shed." Indeed, there are few, even of the clergy themselves, who would counsel a literal obedience to the precepts of the Old Testament when they are abhorrent to the moral sentiment of the present age.

The teachings of Christ bear evidence to the great moral

[1] An address delivered by Hon. Henry B. Brown, ex-justice of the United States Supreme Court, before the Maryland State Bar Association.

progress which had been made in the fifteen or twenty centuries which had elapsed since the days of the Pentateuch. Society had evidently advanced from a state of semi-barbarism to that of civilization. The murders, cruelties, treacheries, and debaucheries, which form so large a part of the Old Testament narratives, disappear and are replaced by the deeds of men, mostly of humble birth, but all animated by the most fervent piety, and devoted to the spread of the new religion. Nothing purer or more exalted has ever emanated from the lips of man than the sentiments expressed by Christ and the early fathers of the Christian church, scattered so generally through the Gospels and Epistles of the New Testament. Could a society be created in which these doctrines were universally accepted and practiced, nothing would be left for the reformer. The ideal of the social state would be attained and government would be unnecessary. But, unhappily, legislation must be framed to apply to actual and not ideal conditions. No society ever existed in which self-seeking did not play a conspicuous part. Whether it break out in the ordinary brutal crimes of the lower classes, which are daily brought before our courts, or in the operations of the wealthy class, who succeed by illegal practices, and sometimes without even the knowledge of their victims, in transferring to themselves the accumulated property of others, the animating motives are the same, and may be included in a most offensive and selfish disregard of the rights of others. But constituted as men are, even the best of us, it is impossible to conceive of a government being carried on upon a literal adherence to the principles taught by Christ in his Sermon on the Mount. It is sufficient to say of these precepts that they have not found, and will never find, general acceptance. Had we been created with different qualities of mind we could, perhaps, have obeyed them literally. But even the command against the taking of oaths, a comparatively trivial matter, is disregarded by all Christian communities except the Quakers. The truth is that no system of laws adopted by an idealist nineteen hundred years ago, and taught by a following of pious and conscientious enthusiasts, can maintain its authority forever, however exalted its origin, if it run counter to the traditions, customs, and general moral standing of the people.

But even if it be conceded that the precepts of the New Testament are not to be taken literally as rules for the guidance of modern society, a proper regard should be paid to them as expressing the views of the loftiest moralist the world has ever seen, whose precepts have been accepted by nearly a hundred generations of the Christian world as divine commands. Some weight should be given to the inherent tradition of the people, that marriage is indissoluble, or dissoluble only for a single cause. In other words, rejecting the absolute authority of the teachings of Christ, there is a residuum of moral obligation which forbids our return to the old Jewish law permitting a husband to put away his wife for any cause he chose to assign, especially as no corresponding right was allowed to the wife as against the husband. It is but just to say, however, that this right was subsequently given by the rabbinical law.

In determining the causes for which divorces may properly be granted, we are bound to consider the nature and obligation of the marriage relation, and the interest which the public have in the conservation of the family tie. The desires of the parties, fleeting perhaps, are not the sole criterion. The marriage relation is the stronghold of the state, and the state has the right to say that it shall not be dissolved for trivial reasons, or because one of the parties may for the moment prefer a separation or the society of another. Marriages are almost always contracted in the expectation of bettering the conditions of the parties — sometimes to obtain a larger share of the comforts and luxuries of life, a perfectly legitimate object within certain limitations, occasionally in the hope of an heir to the throne or estate, but in probably nine cases out of ten, from mutual affection, I venture to say that the possibility of an ultimate divorce is not seriously considered as a motive in one case out of fifty. In the nature of things, every marriage is to a certain extent a lottery — entered into at the risk of loss of fortune, want of congeniality, the failure of progeny, or continued incapacitating illness. But in all these cases the law refuses, and properly refuses, relief, except that in a few of the States incurable insanity is declared a ground for divorce, where proper provision has been made for the support of the insane person and children.

But leaving these out of consideration, it is not perceived why the partnership created by marriage should so far differ from a commercial partnership, that one may be dissolved at pleasure while the other is absolutely indissoluble. A proper regard for the interests of the state, as well as the preservation of domestic happiness, would seem to require that, when the whole object of the matrimonial compact has been defeated by the habitual, persistent, and uncontrollable conduct of either party, and that relation which should represent the acme of human happiness is made to stand for all that is most repugnant to our desires and anticipations, a severance of the tie should be permitted. The story of domestic unhappiness is only too familiar, a story of passion declining through various gradations to gratification, indifference, satiety, and finally disgust; of the conviviality natural to youth, degenerating into dissipation and intemperance; of a selfish indifference to the rights of the other party, by no means the exclusive prerogative of either sex; of an irritable temper finding vent in a cruel disposition and culminating in abusive language and personal violence; of criminality, in police courts and the penitentiary, and the consequent inability to support a family; of desertion and hopeless incompatibility of temper — in fine, of love curdled into hate, and an existence unendurable to one or both of the parties. Who shall say that relief from this subtle torture is not a benefaction? That the law, which is alert to punish infractions of the social compact, should refuse legislation which would render them impossible, is certainly a reversal of the old maxim that an ounce of prevention is worth a pound of cure.

As this country is the most advanced of any in respect to its domestic legislation, and less hampered by traditional or inherited prejudices, it might reasonably be expected that it would act most liberally for the relief of those to whom the marriage tie has become unendurable. Recognizing the fact that the relation is often entered into hastily, upon slight acquaintance, especially by young people, and that in any case either party may be deceived as to the character of the other, provision is made in all the States except South Carolina, and in most European states, for a divorce *a vinculo*, though there is a considerable diversity among the States as to the causes for which they may be obtained. I am indebted to Mr. Keezer's recent work upon Marriage and Divorce for a valuable compendium of these laws.

In the District of Columbia, New York, and now North Carolina, no distinction is made between the adultery of the man and that of the woman, nor between a single act and multiplied acts, except in Kentucky and Tennessee, where there must be a "living in adultery" on the part of the husband to justify the wife in applying for divorce. Under the Spanish provincial code in force in the Philippines, and generally also in Latin countries, the adultery of the husband must result in public scandal or disgrace to the wife. There is some reason for this distinction between the plucking of a single forbidden fruit, and a continued course of licentious living. Though adultery still stands, and probably will always stand, at the head of the

list of statutory causes for divorce, it is probably more frequently condoned than any other, and is often much less destructive to domestic happiness.

All the States, with the exception of those enumerated above, provide for divorce upon different grounds, and with somewhat different limitations. Most of these may be grouped under the heads of —

1. Habitual intemperance, more or less incapacitating;
2. Extreme cruelty, sometimes physical, sometimes also mental;
3. Conviction of crime, and consequent imprisonment for a greater or less period, and with different limitations;
4. Desertion and abandonment for a number of years. These and adultery are the sole grounds for divorce in New Jersey;
5. Neglect to provide for one's family;
6. Hopeless insanity in California, Florida, Idaho, Indian Territory, Washington, and Pennsylvania;
7. Pregnancy of wife before marriage in Alabama, New Mexico, Oklahoma, Tennessee, and Virginia.

There are other causes, such as impotence, fraud, and Chinese leprosy (in Hawaii), but they are of minor consequence.

The law of France permits divorce for adultery, cruelty, abusive language, and from persons punished for infamous crimes. The laws of Continental Europe do not differ materially from those of the United States.

Who shall say that the existence of any one of these causes may not strike at the root of the marriage relation, defeat the very object for which it was entered into, and render it a curse instead of a blessing? Who shall say that this practical unanimity of the forty-six States constituting the United States, and of the most highly civilized countries of Europe, should not override the sentimental considerations which oppose themselves to any dissolution of the marriage tie?

The practical results obtained from a divorce granted for any of these causes are what might have been expected — relief from a situation which had become unendurable, and an opportunity for each party to seek his own happiness in his own way. Of course, each party must form his own opinion of these results from his own observation. No statistics are possible. Speaking for myself, I can only say that I cannot recall a divorce fairly obtained, without fraud, and upon due and personal notice to the other side, that did not apparently redound to the welfare of the parties, and prove a real blessing. They are doubtless sometimes granted upon insufficient facts by easy-going judges, anxious to curry favor with the bar and litigants. This more often happens where the case is uncontested. But the power to grant divorces must be reposed in some one, and if the legislature define the law and the procedure with sufficient strictness, it cannot be held responsible if weak judges occasionally overstep the limits marked by the words of the statute. Judges cannot be made competent, nor mankind moral, by legislation; and the state discharges its whole duty by providing the best methods for their selection, and stringent limitations upon their actions.

There are causes always operative to deter unhappy couples from rushing into the divorce courts to remedy evils which after all may be but transient. The reluctance to break up a home — to expose the family skeleton, and to admit their marriage has been a failure; the unpleasant notoriety of the proceedings; the social stigma cast upon the parties; the difficulty of making proper disposition of the children, and the settlement of property rights, are usually sufficient deterrents. But there is still a large number of cases where cohabitation or reconciliation is impossible, and the courts are sought as a last resort. The moralist may counsel forbearance and patience, but we have to take human nature, not as we would have it, but as we find it, with all its imperfections and unreason, and it is simply impossible to remake it by advice or legislation.

The churches and a large number of conscientious persons, admitting the impossibility of cohabitation in certain cases, hold out a separation from bed and board as the only proper legal remedy. Legislatures have usually provided for this by prohibiting remarriage pending an appeal or an opportunity for appeal, and sometimes in perpetuity. But few avail themselves of a separation when a divorce *a vinculo* can be obtained. It is easily evaded, but practically disregarded. Indeed, the story is often told of a divorce obtained in New York in the morning with such a prohibition, and a remarriage in Connecticut in the afternoon. A divorce *a mensa et thoro* does indeed destroy the marital relation previously existing, but it substitutes nothing in its place but single unblessedness. Divorces, however, are sought not from a general antipathy to the marriage relation, but to the particular person to whom the aggrieved party happens to be united. A situation more provocative of temptation and scandal cannot be imagined. For the former relation is substituted a marriage which is not a marriage — a celibacy, an amphibious existence which places the strongest instincts of our nature under a ban, and deprives both parties not only of the companionship of the other sex, but of the comforts of a home life. A legal separation is in fact a punishment, rather than a remedy — a lifelong condemnation to the cell of an anchorite of a person either wholly innocent, or whose misbehavior may have been brought about by the faults of the other party, and who amid more congenial surroundings might have lived a contented and virtuous life. If remarriage be denied to an innocent party, it inflicts a stigma upon her name and a horrible injustice for no fault of her own. If she be guilty, it denies to her seducer the only reparation he can make for the misery he has caused. In short, a divorce *a mensa* is a medicine easy to administer to others, but hard to take to ourself.

But if the States have not been too liberal in defining the cases for which divorces may be granted, the procedure usually provided is exceedingly lax and unsatisfactory. It is, indeed, at the bottom of nearly all the evils of the system and of the unpopularity of the divorce statutes. It may be said in general that, whenever a new statute is passed in the interests of the public order, there is a class of persons always standing ready to defeat its object and make it odious — if it be a penal statute, by evading it; if it be remedial, by abusing it. This is notoriously so in respect to divorce statutes. Constant frauds are being perpetrated, either by establishing a fictitious domicil of the plaintiff in a State where divorces are easily obtained, or by the want of actual personal notice to the defendant. A person who conceives that he or she has been badly treated by the other party in a State where divorce can only be obtained for adultery takes refuge in a distant State whose laws are more liberal, puts up at a hotel, or nominally takes a room there, and retains it for the period prescribed by statute for acquiring a domicil, institutes proceedings for a divorce, calls the defendant in by publication in a newspaper of which he has never heard, and which is known only in the particular locality, makes proof through the mouths of one or two conniving witnesses, with no opportunity for cross-examination, procures a decree to be signed, and takes the next train back to the matrimonial domicil. Too much cannot be said in condemnation of this disgraceful practice. It is scarcely necessary to say that a divorce thus obtained against a nonresident by a person having no real domicil in the State of the forum is void, and will be so held in every jurisdiction in which its validity is called in question. . . .

What then is the remedy for this deplorable state of affairs? Resort to the federal courts is impossible without an amend-

ment to the Constitution, which is equally impossible. A concerted action on the part of the States is also impracticable, when it is considered how far New York, the Carolinas, and the District of Columbia are from the other States in determining the causes for which divorces are granted. To secure a uniformity of law with respect to procedure is apparently the only recourse. It may be difficult, but it is not impossible, and it is to the credit of the American Bar Association that a step has already been taken in this direction. Such a law should provide:

1. Before taking jurisdiction of a bill for divorce against an absentee, it should be proved by written evidence that the plaintiff has resided at least one year within the State. This should be made to appear not alone by the petition, but by affidavits and depositions showing how, when, and where the domicil was acquired. These should be filed in the case, that the courts of other States may inquire into the jurisdiction, in case of further proceedings in such other States, or an attempt to use a really fraudulent divorce.

2. Personal notice should be required whenever the defendant can be found within the United States, and proof made by affidavits of personal delivery of the notice, or by registered letter with the usual receipt of the addressee required by our postal laws. These should also be filed in the case. Notice by publication should only be allowed where the defendant lives abroad, or where personal service cannot be obtained within the United States.

3. I see no necessity for preserving the testimony taken upon the trial of merits, as it could not be impeached in another court except upon appeal, and would serve only as a temptation to newspapers and other scandal mongers. Even the basest of men prefer that their grievances should not be aired in public. In proper cases the court might order the testimony taken *in camera*.

The main difficulty arises from too close an assimilation of proceedings for divorce to those for the foreclosure of a mortgage, purely local suits wherein publication is made principally to call in subsequent incumbrances, and prejudice rarely results. There is doubtless some analogy between them, but divorces differ so much in their character, and the temptation to abuse their powers is so great, that a procedure quite safe in one class of cases may be wholly unsafe in the other.

In view of the fact that unhappy marriages are often the result of hasty or ill-considered action, it is evident that reformatory measures should begin not at the divorce court, but at the altar. A system which permits a young couple still in their teens, without the consent of their parents, the knowledge of their friends, or opportunity for reflection, to appear before a justice of the peace or a minister of the gospel, and enter into the most solemn contract of their lives cannot but result in many fatal mistakes and often long misery. A publication of the banns in the parish church for two successive Sundays was formerly required by the laws of England and her colonies, but in a country where there is no state church and such a multiplicity of denominations as here, this method appears somewhat unsatisfactory, though I understand it to be still the law in Maryland. Under the law of France not only is the consent of the parents required, where the parties are under thirty years of age, but they must apply to an officer of the state, make minute declarations regarding their names, professions, and domicil, as well as those of their parents, and there must be two publications at intervals of eight days and a notice posted at the door of the city hall. This system would doubtless be regarded as too great a restraint upon individual liberty to be tolerated in this country, but it cannot but exercise a wholesome influence in preventing divorces. Upon the other hand, if no restraint whatever be placed upon marriage, an error of judgment should not be punished by a life sentence to what is virtually a solitary confinement. If the state has erred in one direction by too great laxity, it should not err in the other by too great severity.

Licenses to marry now required in many, probably most, of the States, are of little value except as evidence of an actual marriage, unless there be power to refuse a license, the granting of which is ordinarily a mere formality. A license should be the result of a judicial proceeding in which the officers should require evidence of the age and competency of the parties, and, if minors, the written consent of the parents or guardians. While this consent may be unjustly refused in certain cases, it can only operate as a delay until the parties reach maturity and reflection has confirmed or changed their original resolution. It is certainly unseemly that the law which invalidates all contracts made by minors should make an exception in favor of the most important obligation they can assume, and leave them helpless in the face of the greatest calamity that can befall domestic life. Public policy demands that a contract of marriage once entered into and consummated shall be irrevocable, but there is all the more need that it should not be entered into without the advice of those who, next to the parties immediately concerned, are most interested in their welfare.

A provision should be made for the publication of an intention to marry or of the license, and an interval of at least a week should be required between the publication of the banns or the date of the license and the performance of the ceremony, that opportunity may be given for a reconsideration by the parties, and the interference of those who desire to be heard. People may marvel at and deplore the frequency of divorces, but so long as marriages are made upon the whim of a moment, divorces will multiply rather than diminish. To encourage reckless marriages and to refuse relief by divorce is the height of legislative unwisdom. It is far better to discourage divorces by making them undesired than by facilitating the unions which make them necessary. Unless the marriage license be preceded by a publication of banns, or followed by an interval of some days before the marriage ceremony, it is but a slight obstacle to the hasty unions which are the most frequent causes of divorce.

The fact that divorces are so frequent is the argument most often cited against them. Yet, after all, it is not altogether sound. Divorces are either objectionable or unobjectionable. If objectionable *per se* they should be prohibited altogether. If not, the public should stand neutral as between the parties. The truth is that the questions connected with marriage and divorce are principally for the parties themselves. The public are only concerned to see that marriages are neither entered into nor dissolved hastily, or for trivial causes. So far as the peace and good order of the community are concerned, there is just as much to be apprehended from a mismated brawling couple tied together by the law, as from the same couple living separately. But legislation cannot prevent ill-considered or unhappy marriages. Nor should it prevent divorces which are likely to conduce to the welfare of the parties. What the subject most needs is a complete divestiture of inherited prejudices and an unbiased consideration of the utility as well as the evil of divorce and the adaptability of the system to the needs of modern society.

But the frequency of divorce has been much exaggerated. Statistics are not easily obtained, but such as they are, they indicate that in proportion to the marriages they run from one to fifty in Maryland, New Jersey, and Minnesota, with a general average not exceeding one to twelve. It is a splendid tribute to the laws of Maryland and New Jersey that the proportion of divorces to marriages is less than that of any other States in the Union.

If these figures could be taken as representing the total number of unhappy marriages, a general feeling of satisfaction would be felt that matters were no worse. But in a great

majority of cases the miseries of an unfortunate marriage are quietly endured for the sake of the children and family connections, or hushed by voluntary separation. Whether by reason of their greater social prominence, tempting to publicity, or because the facts justify the inference, divorces appear to be more common among the very rich than in any other class. With every desire gratified, every whim indulged, with luxury of dress, jewels, and equipages at their command, with everything that should make for peace and contentment, the faces of many, especially of women of the multi-millionaire class, bear unmistakable evidence of dissatisfaction, bad temper, and unhappiness.

This is the retribution which the good Lord seems to exact for a surfeit of those things which in moderation would prove a blessing. Bad passions inevitably produce domestic discord, and the last attempt at relief is grasped at in an appeal to the divorce courts.

Fortunately, these victims of marriage *à la mode,* of which we are hearing so much, are not typical or representative Americans, and are so rare as to be really a negligible factor in our social structure. The importance given them in the newspapers is purely factitious and misleading.

It is, perhaps, unfair to say that there is more domestic infelicity among the wealthiest class, but the general consensus of opinion among thoughtful men seems to indorse the prayer of Agur, "Give me neither poverty nor riches," as the touchstone of good fortune.

The most beautiful picture of domestic bliss in the English language is taken not from the marble halls of the rich, but from the evening fireside of an humble Scottish peasant in "The Cotter's Saturday Night."

Cases of Interest.

Sufficiency of Indorsement of Notes by Cablegram. — In Greenwich Bank of the City of New York *v.* Oppenheim, 118 N. Y. Supp. 297, the New York Appellate Division Court, First Department, holds that inasmuch as a contract to indorse a note for discount by a bank is a promise to answer for the debt of another and therefore within the statute of frauds, a cablegram saying "Will indorse ten thousand," sent to the lending bank in response to a communication by the borrower stating that the bank would lend the money if the agreement to indorse were cabled over, is not a sufficient memorandum to bind the sender as indorser.

Judgment for False Imprisonment as Liability Discharged in Bankruptcy. — In Johnston *v.* Bruckheimer, 118 N. Y. Supp. 189, the New York Appellate Division Court, First Department, holds that under the provision of the National Bankruptcy Act that "liabilities . . . for wilful or malicious injury to the person or property of another" shall not be affected by a discharge in bankruptcy, a judgment for false imprisonment upon a complaint not alleging that the judgment defendant was actuated by malice in causing the plaintiff's arrest is not a liability for "wilful and malicious injury" and is therefore discharged by the defendant's discharge in bankruptcy. The distinction between false imprisonment and malicious prosecution, as involving the element of malice, is pointed out. Houghton, J., dissents.

Office for Taking of Usurious Interest as Disorderly House. — The New Jersey usury statute forbids the charging or collection of usurious interest and provides that the borrower of money on which usury is paid shall be entitled to have the amount of the usury deducted from the principal of the loan. No other penalty is provided. In a prosecution for the crime of keeping a disorderly house in habitually taking usurious interest in a certain office, the New Jersey Court of Errors and Appeals, in State *v.* Martin, 73 Atl. Rep. 548, affirms the conviction of the defendant and holds that a place where practices interdicted by statute are habitually carried on is a disorderly house, and that therefore a person who maintains a place of business in which the law against usury is habitually violated is guilty of the offense of keeping a disorderly house.

Liability of Saloon Lessee for Rent after Adoption of Prohibition Law. — In O'Byrne *v.* Henly, 50 So. Rep. 83, the Alabama Supreme Court had before it the question whether the prohibition law of the State terminated, *ex proprio vigore,* leases of premises let only for saloon purposes. The defendant, the lessee of a saloon, sought to resist the collection of rent accruing after the prohibition law on the ground that such law operated to destroy totally the business by which the lease was to be carried on. The court held that the lease, being used by the lessee for a saloon not only for the sale of intoxicants but for the sale of soft drinks, cigars, etc., as well, was not terminated by the prohibition law so as to release the tenant from liability for future rent, as the business was not totally destroyed, and the word "saloon," as used in the lease, did not exclude the sale of other things not within the prohibition law.

Right of Religious Society to Recover Damages for Interference with Worship by Noises in Operation of Railroad. — In Twenty-second Corporation of Church of Jesus Christ of Latter-Day Saints *v.* Oregon Short Line Railroad Co., 103 Pac. Rep. 243, the Utah Supreme Court holds that interference with religious services by the noises incident to the rightful operation of a railroad and train yards near the church, without any physical interference with the church property, does not give the religious society a right of action for damages against the railroad company, under a constitutional provision that private property shall not be taken or damaged for public use without just compensation, and that such interference with the services is not a private nuisance giving the religious society a cause of action for damages. The fact that the degree of annoyance to the worshiping congregation might be greater than the annoyance would be to a home from the same cause is held to create no right to damages in favor of the church society.

Recovery under Laws of Forum for Injury Received in Foreign Latin Country. — In Cuba Railroad Co. *v.* Crosby, 170 Fed. Rep. 369, the Circuit Court of Appeals of the Third Circuit holds that in an action in a federal court by a servant against the master to recover damages for a personal injury received in the island of Cuba, and alleged to have been caused by the failure of the defendant to furnish the plaintiff reasonably safe machinery with which to work, the court will apply to the action, which is one cognizable at common law, the law of the forum, on the presumption that such is the law of the country where the injury was received, and will not deny a recovery because the law of such country is not pleaded or proved. Judge Gray dissents on the ground that, since the country where the injury was received is a Latin country in which the common law is not in force, it was essential for the plaintiff to allege and prove that the acts of the defendant complained of gave him a right of action under the laws of that country.

Whether Liability on Fire Insurance Policy Is Value of Property at Time of Loss or at Starting of Fire. — In Liverpool, London & Globe Insurance Co. *v.* McFadden, 170 Fed. Rep. 179, the United States Circuit Court of Appeals of the Third Circuit holds that under a fire insurance policy limiting

the liability of the company to the actual cash value of the property at the time the loss or damage occurs, the amount of the liability is not the cash value of the insured property at the time it is exposed to danger of loss by the outbreak of the destructive conflagration, but the cash value at the time the loss occurs, which is the time when, as nearly as can be ascertained, the fire actually reached and consumed or damaged the property. Here the property insured consisted of cotton. The fire burned for some time and destroyed about one-third of all the cotton in the port of New York, but the property of the insured was not burned until some time after the conflagration started. In the meantime, on account of the large quantity of cotton destroyed, the price of that commodity rose sharply. The contention of the insurer that the loss of the insured should be estimated according to the price prevailing at the start of the fire was rejected.

Constitutional Right to Measure and Photograph Unconvicted Person. — In Downs *v.* Swann, 73 Atl. Rep. 653, the Court of Appeals of Maryland holds that it is no violation of the personal rights of a person who has been arrested for crime, but who has not been tried or convicted, for the police authorities of the city of Baltimore to measure and photograph him under the Bertillon system, in order that a record of his description may be kept by the police department as a means for his identification. The person under arrest sought to enjoin the police from making the record in question on the ground that to do so would work irreparable injury to him and violate his constitutional rights in view of the fact that he was, as yet, unconvicted of any crime. It was not alleged in the bill that the police intended to use the photograph or description in the rogues' gallery or distribute copies thereof to the police authorities of other cities unless the complainant was convicted or became a fugitive from justice, or that they proposed to apply his Bertillon record to any other purpose than his identification by the police of the city of Baltimore. The right to make the photograph and description for the use stated is sustained as a valid exercise of the police power in dealing with suspected criminals.

Mental Agitation of Juror as Ground for New Trial. — In People *v.* Lutzow, 88 N. E. Rep. 1049, the Supreme Court of Illinois was asked to set aside a conviction on the ground that the trial court refused to excuse a juror who was anxious to escape jury service under somewhat peculiar circumstances. After the jury had been impaneled and sworn and considerable evidence heard the juror asked, just after a noon recess, to be excused so that he could be at home with his wife who, according to his statement, was sick. In a consultation between the juror, the judge, and counsel, it appeared that the juror's wife was not sick at all but that she objected to his serving on the jury and demanded that he be excused. The juror was very anxious to oblige his wife and manifested some agitation and said that he was afraid that if he did not go home his wife would leave him and he would lose her. The judge refused to recognize the gravity of the situation and decided to proceed with the case. The defendant objected to proceeding with the juror on account of the "agitated condition of his mind." The Supreme Court said that all the circumstance amounted to was that the juror's wife was angry because she did not believe that he had tried in good faith to get excused, and sustained the trial court in refusing to excuse him.

Liability of Owner of Automobile for Negligence of One Permitted to Use It. — In Ingraham *v.* Stockamore, 118 N. Y. Supp. 399, Justice Spencer, of the New York Supreme Court, holds that the owner of an automobile who permits his machine to be taken out and driven by another person is liable for injuries caused by the negligence of the latter in operating the machine. It appeared that at the time of the accident in question the chauffeur was in charge of the machine, with the consent of the owner, and was taking a pleasure trip or "joy ride" with some boon companions, when he negligently ran into a vehicle on the street, causing the injuries complained of. A verdict was rendered against the owner under an instruction that a verdict might be found against him if the machine was being used with his consent, the charge being in these words: "I am going to charge you that the owner of an automobile should be responsible for injuries caused by it by the negligence of any one whom he permits to run it in the public street." The legal proposition contained in this instruction is said to be a novel one, but is declared to find full justification in the novelty of the situation. The statute requiring the registration of the names of the owner and chauffeur and number of each automobile and the display of the number on the back of each car is held to show that the legislature regarded automobiles as dangerous machines, and the court arrives at this conclusion: "An automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by any one with his consent. He may not deliver it over to any one he pleases and not be responsible for the consequences."

Unauthorized Publication of Photograph as Violation of Right of Privacy. — An action for damages on the ground that the defendants had published a likeness of the plaintiff in a newspaper advertisement without his authority and had thereby invaded his right of privacy, was before the Rhode Island Supreme Court in Henry *v.* Cherry & Webb, 73 Atl. Rep. 98. The defendants were general merchants advertising their merchandise in the newspapers, and in connection with such advertisements published a picture of the plaintiff, representing him as seated in an automobile, apparently driving the same. Several other persons were represented as sitting in the rear seat of the automobile. The picture of the plaintiff was such as to be easily recognizable by his friends and acquaintances. Below the picture in heavy black type were the words: "Only $10.50. The auto coats worn by above autoists are water-proof, made of fine quality silk mohair — $10.50 — in four colors." It was alleged that the publication tended to and did make the plaintiff the object of much scoff, ridicule, and public comment, contrary to the plaintiff's right of privacy, and that by reason of such ridicule and comment he had suffered great mental anguish to his damage in the sum of $1,000. Any element of libel was eliminated from the case. The court held that there is no such thing as a right of privacy for the invasion of which an action for damages lies at common law, and that therefore the plaintiff could not recover.

A seemingly contrary decision was rendered by the Kentucky Court of Appeals in Foster-Milburn Co. *v.* Chinn, 120 S. W. Rep. 364, wherein it was held that a person has the right of privacy as to his picture and that the publication of the picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, is a violation of the right of privacy and entitles him to recover without proof of special damages. In this case the picture was published in a patent medicine magazine advertising a preparation called "Doan's Kidney Pills," and was accompanied by a personal sketch and a forged letter of recommendation of the pills in question. The court evidently considered the publication as in the nature of a libel.

I am a great friend to the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice. Lord Mansfield, C. J., *Towers* v. *Barrett*, (1786) 1 T. R. 134.

New Books.

Mexican Law for American Lawyers.

A Handbook of Mexican Law, Being an Abridgment of the Principal Mexican Codes. By Robert Joseph Kerr, of the Chicago Bar. Pp. xxxi + 260. Chicago: Pan American Law Book Co., 1909. $3.50.

The average American lawyer, if called upon by a client for advice as to interests in Mexico, would be not only ignorant of the law itself, but more than a little puzzled to know where to obtain the desired information. He would probably be aware in a general way that the Mexican juridical system is based on the civil law, but there he would come to a halt. Yet with the large and constantly increasing number of Americans who year by year are investing money, acquiring rights, and incurring liabilities in the republic which is our next-door neighbor on the south, questions of Mexican law are becoming of more and more importance to American lawyers and are taking on an interest remote from the purely academic.

The object of Mr. Kerr's book is to present the whole body of Mexican law in such shape as to give, first, a general idea of what the law is, and, second, a means of referring to the specific statutory provisions in their original form. The plan adopted to attain this object has been to present a concise abstract of the Constitution of Mexico and of the most important codes and statutes. The American lawyer will be impressed by the fact that citations of "cases" construing and applying the various statutory provisions find no place in the book. The veneration for judicial decisions which obtains in England and the United States is practically unknown under the Spanish system. The Mexican lawyer, in determining the rights of his client, goes to the statutes, not to the opinions of judges.

In working out the author's plan, parts of the original articles and sections are translated in full, others are abridged, and still others, such, for example, as enactments dealing with the rights of husband and wife, parent and child, etc., which are of no particular interest to others than citizens of Mexico, are noticed only by giving the headings and numbers of the sections or articles in the original version. The work does not purport to be a translation, as that term is usually understood. The Mexican Constitution consists of upward of 100 articles, the Civil Code of nearly 4,000, and the Commercial Code of some 1,500. To furnish an epitome of these, rather than to translate literally, has been Mr. Kerr's effort. All of the book, title, and chapter headings of the Constitution and of the Civil and Commercial Codes have, however, been rendered into English and are given in the order in which they occur in the originals, and several entire enactments, of particular importance, have been literally translated — some of them for the first time in this book.

The book should prove extremely useful, not only to lawyers who are unfamiliar with Mexican law, but to those also who have made a special study of that system. To the latter it will serve as an index to the original enactments, bringing related matters together and assisting materially in a comparison of cognate topics.

Of the accuracy with which the author has performed his task, it is of course impossible to judge in the absence of any familiarity with the subject of his book. The presumptions, however, based on his evidently logical mind, his accurate indexing, his easy command of good English, and similar indicia of competency, are all in his favor.

The work contains forms of instruments in Spanish and English and a table of equivalent weights and measures. The index is particularly full and comprehensive, and the mechanical features of the book are in every way admirable.

H. H V. D.

The Pandects in English.

The Digest of Justinian. Translated by Charles Henry Monro, M. A., Fellow of Gonville and Caius College, Cambridge, Barrister at Law. Vol. II. Pp. viii + 453. Cambridge: University Press, 1909. New York: G. P. Putnam's Sons. $4.00.

Since the publication of the first volume of Mr. Monro's translation of the Digest of Justinian fully five years have elapsed. Before the manuscript of the second volume could be finished the translator died, and Mr. W. W. Buckland has assumed his task. The present volume, therefore, while nearly all the work of Mr. Monro, and credited solely to him on the title page, has been completed and made ready for publication by Mr. Buckland, who in a short prefatory note generously assumes full responsibility for any defects that may be found to exist.

The first volume contained the first six books of the Digest, and volume II. carries the translation through Book XV. This presumably contains all of Mr. Monro's work, since the greater part of Book XIV. and the whole of Book XV. are expressly stated not to be due to him. It does not appear whether the translation of the rest of the Digest is to be carried forward by Mr. Buckland or by another.

The work, whether by Mr. Monro or Mr. Buckland, appears to be well and carefully done. The accuracy of the translation may be premised. Footnotes relating to the rendition of particular words and phrases, and frequently collating the versions of Professor Mommsen and others, are frequently given. Except for these the text is presented practically without commentary.

Aside from its obvious usefulness to those lawyers who, lacking a working knowledge of Latin, wish despite that handicap to familiarize themselves as far as possible with the civil-law system, the work should be of considerable value for purposes of comparison with existing translations of the Digest into other languages and with the original.

News of the Profession.

Canadian Law Library Burned. — On September 1 a fire in the Parliament Buildings at Toronto destroyed the Mowat law library, one of the best collections in the Dominion of Canada.

Distinguished Californian Dies. — General John H. Dickinson, of San Francisco, one of the most prominent members of the California bar, died August 22, on a ranch near Healdsburg, Cal., aged fifty-eight.

Mr. Hoyt Made Counselor to State Department. — Henry M. Hoyt, former solicitor-general of the United States, has been appointed to the newly created office of counselor to the State Department.

Prominent Iowa Lawyer Hangs Himself. — A. E. Swisher, of Iowa City, Ia., ex-president of the Iowa State Bar Association, killed himself by hanging on August 29. His act is thought to have been induced by worry over financial troubles.

Cleveland Lawyer a Suicide. — Roger M. Lee, a well-known admiralty lawyer of Cleveland, committed suicide on September 2 by shooting himself in the head. Continued ill health is said to have been the underlying cause.

Eminent Baltimorean Passes Away. — Hon. Conway Whittle Sams, associate judge of the Supreme Court of Baltimore and one of the leading members of the Maryland bar, died at Atlantic City on September 5 of diabetes. He was an ex-president of the Maryland State Bar Association.

THE MICHIGAN STATE BAR ASSOCIATION held its annual meeting in Detroit on August 24 to 28. There were no set addresses, and only routine business was transacted, so that the members could attend the sessions of the American Bar Association, which met in the city on the same dates.

WILLIAM F. CARR, OF CLEVELAND, DIES. — William F. Carr, former president of the Ohio State Bar Association and one of the most prominent lawyers in Cleveland, died in that city on September 1, aged sixty years. Mr. Carr was senior member of the firm of Carr, Stearns, Chamberlain & Royon.

THE EASTERN MONTANA BAR ASSOCIATION held its annual meeting at Livingston, on August 25 and 26. Among the speakers were Chief Justice Morgan, of the North Dakota Supreme Court, Judge Sidney Fox, Judge Frank Henry, and Mr. Walter Aitken. John T. Smith was elected president, and A. P. Strak was made secretary and treasurer.

NEW YORK'S DISTRICT ATTORNEYS ORGANIZE. — At Albany, on September 2, the district attorneys of the various counties met and effected an organization, electing the following officers: President, William Travers Jerome, of New York; vice-president, Beecher S. Clother, of Glens Falls; secretary and treasurer, Rollin B. Sandford, of Albany. The association will hold a meeting and banquet in Albany on February 16.

DEATH OF FORMER NEW YORK JUDGE. — Hon. Celora E. Martin, ex-justice of the New York Court of Appeals, died on September 11, at his home in Binghamton, aged seventy-five. Judge Martin was admitted to the bar in 1856. He became a judge of the State Supreme Court in 1877, which position he held until 1895, when he was promoted to the Court of Appeals. At the end of 1904 he retired on the age limit.

EX-CHIEF JUSTICE OF CALIFORNIA DEAD. — Hon. William T. Wallace, former chief justice of the California Supreme Court, died at his home in San Francisco on August 11, at the age of eighty-one years. He was a native of Kentucky, but went to California in 1850, and six years later was elected attorney-general of the State. In 1870 he was elected a justice of the Supreme Court, and served as chief justice from 1872 to 1879.

JUDGE M. F. MORRIS DEAD. — Hon. Martin F. Morris, ex-chief justice of the District of Columbia Court of Appeals, and one of the oldest and most prominent members of the Washington bar, died there on September 13, at the age of seventy-four. Judge Morris was one of the attorneys for the defense in the trial of John H. Surratt for complicity in the slaying of President Lincoln. He was appointed to the Court of Appeals in 1893. Several years ago he retired.

NORTH DAKOTA STATE BAR ASSOCIATION. — The tenth annual meeting of the North Dakota State Bar Association was held in Minot, on August 12 and 13. The annual address was delivered by W. T. Hughes, of Chicago, whose subject was "The Immutable Elements of Jurisprudence and Law Reform." Prof. James E. Boyle, of the State University, also delivered an address. The meeting concluded with a banquet given by the Ward County Bar Association.

DEATH OF GENERAL SHACKLEFORD. — Brig.-Gen. James M. Shackleford, former United States judge for Indian Territory, a veteran of both the Mexican and Civil wars, died on September 7, at his summer home near Port Huron, Mich., at the age of eighty-two. He was in command of the troops that captured Gen. John H. Morgan, the famous Confederate raider. He was appointed to the bench in 1889 by President Harrison, and served until 1893, since which time he has practiced law in Muskogee, Okla.

TAFT COMMITTEE MEETS IN NEW YORK. — The committee appointed by President Taft to advise regarding desirable changes in the laws governing corporations engaged in interstate commerce began its deliberations in New York city on August 31. This committee consists of Attorney-General Wickersham, Solicitor-General Lloyd W. Bowers, Secretary of Commerce and Labor Charles Nagel, Congressman Charles E. Townsend, of Michigan, Martin A. Knapp, chairman of the Interstate Commerce Commission, and Charles Prouty, also a member of that commission.

ATTORNEYS-GENERAL MEET IN BUFFALO. — The National Association of Attorneys-General held its third annual meeting in Buffalo on August 27 and 28. Attorney-General O'Malley, of New York, delivered the opening address. A number of important problems were discussed during the meeting, among them the liquor question, and the power of the State to control corporations. Attorney-General James Bingham, of Indiana, delivered an address on the authority of the attorney-general to represent the State. The following officers were elected: President, Fred S. Jackson, attorney-general of Kansas; vice-president, U. S. Webb, attorney-general of California; secretary and treasurer, James Bingham, attorney-general of Indiana.

DEATH OF EX-JUDGE BUCK, OF IDAHO. — Hon. Norman Buck, a former justice of the Supreme Court of the Territory of Idaho, died at his home in Spokane, Wash., on August 28. Judge Buck was born in New York in 1833, and received his legal education at the Albany Law School. In 1878 President Hayes appointed him United States attorney for Idaho, and in 1881 he was appointed to the Supreme Court by President Arthur. In 1885 he came prominently before the public by reason of his decision that the tremendously valuable Bunker Hill and Sullivan mines had been discovered by a jackass and that the owners of the beast were entitled to a large share in the claims.

COLORADO STATE BAR ASSOCIATION. — The twelfth annual meeting of the Colorado State Bar Association was held in Colorado Springs on September 3 and 4. President Wilbur F. Stone, of Denver, was in the chair and delivered the opening address. Other speakers were Harry Kelly, of Denver, Charles C. Butler, of Denver, and Henry C. Hall, of Colorado Springs. An interesting feature was a lecture on "Life in the Temple," by Henry Latchford, formerly of the Inner Temple, London. The new officers of the association are Lucius W. Hoyt, of Denver, president; Henry C. Hall, of Colorado Springs, and E. L. Regenitter, of Idaho Springs, vice-presidents; W. H. Wadley, of Denver, secretary and treasurer. The annual dinner was held on the evening of the last day.

DEATH OF SIR SAMUEL STRONG. — Sir Samuel H. Strong, for many years chief justice of Canada, died at Ottawa on August 31, at the age of eighty-four. He was called to the bar in 1849 and speedily won distinction as an equity lawyer, being made a Q. C. in 1863. Six years later he became vice-chancellor of the Court of Chancery. In 1874 he was called to the Court of Error and Appeal of Ontario, and in the following year was chosen by Lord Dufferin to become a puisne judge in the newly constituted Supreme Court of Canada. He was promoted to the chief justiceship on the death of Sir W. J. Ritchie in 1892, and received the honor of knighthood a few months later. He was appointed a member of the Judicial Committee of the Privy Council in 1897. In 1902 he resigned the chief justiceship and became chief of the commission then appointed to revise and consolidate the statutes of Canada.

SOUTH DAKOTA STATE BAR ASSOCIATION. — The tenth annual meeting of the South Dakota State Bar Association was held in Deadwood on August 12, 13, and 14, with President William L. McLaughlin in the chair. The meeting began with the president's address on "The Strife for Justice." Other papers were "Irrigation in the West," by Wesley A. Stuart, of Sturgis;

"State Taxation," by John B. Hanten, of Watertown; "The Federal Income Tax," by Edward E. Wagner, of Alexandria; "The Flux of Laws," by Norman T. Mason, of Deadwood; "Federal Control of Corporations," by Congressman E. W. Martin, of Deadwood. The following officers were elected: President, Edward E. Wagner, of Alexandria; vice-presidents, Chambers Kellar, of Lead, and Wesley A. Stuart, of Sturgis; secretary, J. H. Voorhees, of Sioux Falls; treasurer, L. M. Simons, of Belle Fourche.

Wisconsin State Bar Association. — The annual meeting of the Wisconsin State Bar Association was held in Milwaukee on August 31 and September 1. President Neal Brown, of Wausau, was in the chair and opened the meeting with an address in which he paid his respects to muckrakers, professional reformers, and other classes which he regarded as undesirable citizens. The annual address was delivered by S. S. Gregory, of Chicago. Other addresses on the programme were "The Spirit of Nullification and Secession in the Northern States," by Robert Wild, Jr., of Milwaukee, and "Some Features of State Regulation of Public Utilities," by John H. Roemer, State Rate Commissioner. The meeting closed with the usual banquet, over which the retiring president, Neal Brown, of Wausau, presided. The officers elected for the ensuing year were as follows: President, James G. Flanders, of Milwaukee; secretary, R. B. Mallory, of Milwaukee; treasurer, J. S. Sanborn, of Madison.

Virginia State Bar Association. — The twenty-first annual meeting of the Virginia State Bar Association was held at Hot Springs on August 10, 11, and 12. President Micajah Woods, of Charlottesville, opened the meeting with an address on "The Necessity for General Culture in the Training of the Lawyer." Other addresses were "Who Was Thomas Jefferson?" by Prof. William M. Thornton, of the University of Virginia; "Taxation in Virginia and Our Relation to the Subject," by W. W. Old, of Norfolk; "Some Observations about Governmental Regulation of Railways, and the Virginia Case," by Judge R. R. Prentis, chairman of the State Corporation Commission; "The Trial of John Brown," by George E. Caskie, of Lynchburg. Numerous social entertainments were interspersed between the business sessions, and the meeting was concluded with the usual banquet, at which the retiring president acted as toastmaster. The following officers were elected: President, R. Walton Moore, of Fairfax; vice-presidents, Robert B. Tunstall, of Norfolk, E. Chambers Goods, of Mecklenburg, J. A. C. Keith, of Fauquier, Abram P. Staples, of Rockbridge, and John W. Chalkley, of Wise; secretary and treasurer, John B. Minor, Jr., of Richmond.

American Bar Association. — The thirty-second annual meeting of the American Bar Association was held in Detroit on August 24 to 27. President Frederick W. Lehmann, of St. Louis, presided and delivered the usual address on the noteworthy statutes enacted during the year. The rest of the first morning session was devoted to committee reports and routine business. In the session of the section on legal education a somewhat heated discussion arose as to the number of years of preparation necessary for admission to the bar. Dean Richards, of the University of Wisconsin, and James Parker Hall, of the University of Chicago, assailed the correspondence schools, and Judge Francis M. Danaher, of Albany, N. Y., replied with a scathing criticism of modern law school methods. At the evening session of the association M. Georges Barbey, of Paris, France, read a paper on "French Family Law," and Judge Julian W. Mack, of the Circuit Court of Cook County, Ill., read one on "Juvenile Courts." The principal feature of the second day was the annual address, which was delivered by Governor Augustus Willson, of Kentucky. His topic was "The People and Their Law," and he gave an interesting account of the "Night Rider" depredations during Kentucky's tobacco war. Justice William L. Carpenter, of the Michigan Supreme Court, read a paper at the evening session on "Courts of Last Resort." A number of important committee reports were filed, among them those on legal education, on patent, trademark, and copyright law, and on judicial administration and remedial procedure. In the afternoon the meeting of the Association of American Law Schools was held. Its president, Charles Noble Gregory, dean of the University of Iowa Law School, delivered the annual address, and Prof. Harold D. Hazeltine, of Emmanuel College, Cambridge University, England, read a paper on "Legal Education in England." Other speakers were Sir Frederick Pollock, of England, and Dean Ames, of the Harvard Law School. The most important feature of the third day was the report of the committee appointed two years ago to consider the matter of unnecessary costs and delays in litigation. The report advocated a gradual but sweeping reform in judicial procedure, suggesting for one thing that the whole judicial power in each State be vested in one great court of three branches. There were no set addresses. The principal business of the last day was the election of officers, which resulted as follows: President, Charles F. Libby, of Portland, Me.; secretary, George Whitelock, of Baltimore; treasurer, Frederick E. Wadhams, of Albany, N. Y.; executive committee, Charles H. Butler, of Yonkers, N. Y., W. O. Hart, of New Orleans, John Hinkley, of Baltimore, R. W. Breckenridge, of Omaha, and Lyna Helm, of Los Angeles; secretary to the general council, Arthur Steuart, of Baltimore. The meeting was closed with the annual banquet, which was held at the Hotel Pontchartrain. Among the speakers were H. A. Lockwood, president of the Michigan State Bar Association; M. Georges Barbey, of Paris, France; J. Hamilton Lewis, of Chicago; W. C. Languedoc, K. C., of Montreal; Dallas Bondeman, of Kalamazoo, Mich.; James T. Keena, of Detroit; W. U. Hensel, of Lancaster, Pa.; and ex-Justice Brown, of the United States Supreme Court.

English Notes.

To Let Clocks Alone. — The select committee of Parliament appointed to consider the daylight saving bill has issued a report which recommends that the bill be dropped because of grave doubts whether its objects could be attained without subjecting some important interests to serious inconvenience.

To Shorten the Long Vacation. — As usual at this time of the year in England there is much talk of curtailing the Long Vacation, some radicals going to the length of maintaining that it should be altogether abolished. Five years ago it was reduced to the period between August 1 and October 12, it having formerly extended from August 4 to October 24. The suggestion which now seems to be receiving the most favorable consideration is to limit the vacation to the months of August and September, which must strike American lawyers as a pretty fair breathing spell, especially in view of the fact that the English courts have during the year two other vacations aggregating seven weeks.

Aeroplane Insurance. — The rapid multiplication of flying machines during the last few months has given rise to a new form of insurance among the English underwriters. London brokers, who place business with the various groups at Lloyds, are now quoting (to prominent flyers only) the following rates:

	Per cent.
Against flying the Channel (within two months)....	£35 @ 40
Against fatal personal accident on sea.....	10 @ ..

	Per cent.
Against personal injury on sea	£13 @ 15
Against accident to aeroplane on sea	5 @ ..
Against fatal accident on land	15 @ ..
Against personal injury on land	20 @ ..

The Cost of England's Courts. — The return of the receipts and expenditures of the High Court of Justice and Court of Appeal for the year ending March 31 last shows that the receipts were 492,296*l.*, and the expenditures 646,530*l.* The deficit of 154,234*l.* practically vanishes, however, when from it is deducted the nearly 100,000*l.* paid out as the retiring annuities of judges and the pensions and compensations of officials, and 50,000*l.*, which is about the amount expended for the rent, rates, and repairs of the Royal Courts of Justice. The salaries paid to the judges of these courts aggregate 160,000*l.*, and the salaries of other officers and employees about 243,000*l.* On the whole, the showing as to the cost of maintaining the courts is very much better than can be made in most American jurisdictions, especially as the English judges are paid on a much higher scale than ours.

Imprisonment for Debt to Be Limited. — The Select Committee of the House of Commons appointed to inquire into the working of the Debtors Act, while deciding not to recommend the entire abolition of imprisonment for debt, have suggested a number of changes looking to the amelioration of existing conditions. The recommended changes are that the period of imprisonment be reduced from forty-two to twenty-one days; that, where the debtor is an artisan, he shall not be committed unless at the time of the hearing he has means in hand or falling due; that no debtor be committed in the absence of evidence that he has means beyond a minimum income needed for necessaries; and that the power of committal be abolished except as to cases where the judgment debt has been incurred for necessaries or for damages for tort. It is thought that these changes will put an end to the present tyrannous use which moneylenders make of the power of committal.

Railways and Blind Passengers. — In England railways are not, as to passengers, regarded as common carriers. At least it has never been decided there whether they are bound to receive and carry all persons who offer themselves to be carried. However, the point seems in a fair way to come up for decision before long in consequence of a rule recently promulgated by the Great Eastern Railway Company in relation to blind persons traveling on its trains. The company has announced that it will not carry any such person, unless, when purchasing a ticket, he signs a document releasing the company from all liability which he may sustain by reason of his defective sight while traveling on its road or using its premises. Of course, if the company is under a legal duty to accept all persons who offer themselves as passengers, there is no consideration for the release of liability; but if no such legal duty rests on it, its agreement to carry the blind person furnishes a sufficient consideration to support the agreement.

Treasure Trove. — The recent discovery at Yeovil of an ancient British torque, or necklace, of pure gold and weighing nearly six ounces, which, according to expert jewelers, was probably manufactured in Britain five hundred years before Christ, has aroused some interest in the law of treasure trove. The torque was found imbedded in clay in the course of some excavation by a gentleman named Henry Coles, who sold it to the Somerset Archæological Society for forty pounds sterling. At this point the police authorities of Somersetshire intervened, claiming that the torque belonged to the King as treasure and demanding that it be delivered up to His Majesty. On the refusal of the museum to comply with the demand a coroner's inquest was held, and the jury returned a verdict describing the object, stating the name of the finder, and declaring that the true owner was unknown. This was the extent of the coroner's jurisdiction, and the question whether the find constituted treasure trove will have to be determined by the higher courts. To have that character it is essential that the thing found shall have been buried or secreted, for otherwise it is abandoned or lost property and belongs to the finder. It is the usual practice of the treasury to allow the finder of treasure trove nine-tenths of its value, and in some cases the prerogative of the crown is not exercised at all. Anciently the penalty for concealing such a discovery was death.

Obiter Dicta.

Settling the Knotty Points. — In Samuel Benedict Memorial School *v.* Bradford, 111 Ga. 801, it appears that a girl thirteen years old was suspended from school for declining to participate in a debate on the subject "Should Trial by Jury Be Abolished."

With Malice Prepense. — At the foot of a will executed a few years ago in South Dakota appears the following: "I, ———, a Notary Public in and for the State of South Dakota, hereby certify that the above will and testament was wilfully signed and executed in my presence."

A Timely Ruling. — The Minnesota Supreme Court has apparently reached the conclusion that the greed of corporations must be checked. In a recent case, Michaud *v.* Erickson, 122 N. W. Rep. 324, this court holds that if a corporation appropriates the earth it is liable in tort for the damages caused thereby.

A Remarkable Feat. — On record in Bosque county, Tex., is a deed in which the separate acknowledgment of the *feme covert* grantor was taken by her husband, a justice of the peace, who duly certified under his hand and official seal that he examined her privily and apart from her husband.

A Wise Precaution. — Not long ago some Utah farmers had occasion to organize a corporation and, desiring to avoid the cost of a lawyer's services, they drew up their own articles of agreement. Among its provisions was the following: "The annual meeting of the company shall be held on the second Saturday of July in each and every year, except when the same falls on a Sunday or a holiday."

A Legislator of the Old School. — Chapter 233 of the Maine Laws of 1907, page 1518, reads as follows: "Resolved, That the Holy Bible used by the Honorable Lorenzo T. Brown on the floor of this house on March fifteenth, from which he punctuated and illuminated his remarks, be and hereby is awarded to him for his future use and reference." It is good betting that Mr. Brown has a beard and a clean-shaven upper lip.

Ready to Give Up the Struggle. — A New Mexico law firm recently received the following letter:

"Please tell me if there is any law in this Territory by which a man can make or have his wife appointed the head of his family. How must he proceed to make her the head of the family instead of himself? If a husband makes his wife the head of his family does this hold good in all law?"

Sydney Smith to Lawyers. — "Some of the greatest and most important interests of the world are committed to your care. You are our protectors against the encroachments of power — you are the preservers of freedom, the defenders of

weakness, the unravelers of cunning, the investigators of artifice, the humblers of pride, and the scourgers of oppression. When you are silent, the sword leaps from its scabbard, and nations are given up to the madness of internal strife."

A LIGHTNING CHANGE ARTIST. — The much-married lady of scriptural fame, regarding whose matrimonial complications when she reached the pearly gates the Pharisees were so solicitous, had very little advantage over Mrs. Grace Snell-Coffin-Coffin-Walker-Coffin-Layman-Love-Love, of Los Angeles, who, on August 28, eloped with her last former husband, Hugh M. Love, a newspaper man. This lady began getting married in 1884. She first married Love a little over a year ago but divorced him. Most of her previous efforts appear to have resulted in Coffins.

A FAILURE OF CONSIDERATION. — In the Superior Court of Gwinnett county, Ga., during August, there was instituted a rather unusual action. The plaintiff, J. L. Moore, described as "a wealthy citizen of Loganville," seeks to recover from Miss Lillie Mabel Berryman, "a pretty and well-known young lady of Gwinnett county," the sum of one thousand dollars paid by him to her in part consideration for her promise to become Mrs. Moore. The defendant, it seems, has refused, and still refuses, either to perform her contract or to return the consideration, wherefore the plaintiff brings his suite.

HELD COURT ON A LAKE. — One of the Italian courts had occasion recently to decide a dispute between the municipalities of Lerina and Lucera, concerning fishing rights in the Lake of Kesina. In order to arrive at an intelligent decision the court found it necessary to visit the lake. The tribunal established itself in several boats and these were surrounded by a fleet bearing the partisans of the contending municipalities. The proceedings were enlivened by the characteristic animation of the Latin races, and a naval battle seemed likely to break out at any moment between the opposing forces. The constabulary, however, had exhibited surprising foresight by manning a boat of their own with carabineers and by this display of armed authority hostilities were averted.

GOOD NEWS FOR KISSEES. — The Commercial Court at Vienna had to decide recently whether the law recognized a distinction between kissing and being kissed. Herr Meyer, a bookkeeper, brought suit against his late employers, alleging that they had wrongfully discharged him. The defendants set up in justification that Herr Meyer had a pernicious habit of kissing the stenographers, which they deemed to be prejudicial to their business, as it took the girls' minds off their work. Herr Meyer's counsel, however, produced witnesses who swore they had witnessed some of the osculatory performances and that the ladies had been the aggressors in every instance, though it did not appear that the plaintiff had repelled the advances as strenuously as he might have done. The court gave judgment in favor of Herr Meyer for a month's salary, holding that the mere passive receipt of a kiss did not constitute kissing in the eyes of the law.

GUARANTEED MARRIAGES. — The following advertisement appeared not long since in the Higginsville, Mo., *Jeffersonian:*

"If you want to sue or be sued, if you have been guilty of any kind of naughtiness, come in.

"Having been appointed justice of the peace for Davis Township I have opened an office in the courthouse in Higginsville and will be pleased to serve all who need my services. Have a matrimonial department in connection. Parties united in marriage by me are guaranteed against separation if the directions of the court are followed.

"Yours for business, R. L. BERRY."

On being interviewed regarding the advertisement by the gentlemanly reporter of the *Jeffersonian,* Squire Berry said:

"I do it because I believe both in matrimony and in advertising. I believe all marriages would be happy if entered into in the right spirit, so I am going to give each couple I marry a set of directions which I have no hesitancy in guaranteeing as a preventive of marital strife. I have had forty-three years' experience as a married man and know what I am talking about."

AN APPEARANCE UNDER DIFFICULTIES. — From a Florida correspondent comes the following:

"In our chancery procedure, which is kept distinct from the common-law procedure, some Solon, in the year A. D. 1828, injected into our statutes a form of subpœna in chancery, which still obtains (section 1864, Gen. Stat. Fla. of 1906), and by which the defendant is required 'personally to be and appear before the judge of our court on ———,' naming the rule day; and 'this you are not to omit under penalty of $500.00.' Neither requirement nor penalty means anything, as the appearance is filed with the clerk, and the only penalty which the defendant can incur is the entry of a decree *pro confesso* on the rule day next succeeding the one at which he is required to appear, in case his answer is not filed at that time. The decree *pro confesso* cannot be entered against him for failing to appear at the appearance day.

"A year or so ago, one of these subpœnas was served upon a certain colored specimen of the genus *homo,* residing at Pompano, in Dade county, forty miles north of Miami, the county seat. On the Sunday night preceding Monday upon which he was 'to be and appear,' this dusky defendant missed the train (as he explained) upon which he intended to make the trip 'to be and appear' as directed in the subpœna. There being no other available means of conveyance, he set out alone and afoot, and about 8:30 the next morning walked into the clerk's office at Miami, exhibiting the copy of the subpœna which had been served upon him, and relating to the clerk the difficulties he had encountered in complying with this solemn injunction of the law."

Correspondence.

CRITICISM OF JUDGES RUNNING FOR RE-ELECTION.

To the Editor of LAW NOTES:

SIR: In your August issue, Mr. E. O. Randall, Supreme Court Reporter of Ohio, undertakes in some particulars to correct the article in LAW NOTES for July, concerning "Criticism of Judges Running for Re-election," this being the offense for which Mr. Randall's official superiors recently disbarred Attorney Thatcher.

However profoundly astonished and alarmed many Ohio law-

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yers, especially those of the minority party, may be, that judges as candidates (mostly of the dominant party) are immunized against all criticism save such as they themselves, or their fellows on the bench, approve as "decent and respectful" criticism, yet it is not without significance that none cares to invite disagreeable consequences by expressing himself. It is, perhaps, still more significant, on the other hand, that no disinterested attorney advances to defend the judges, a task which thus falls upon their own stipendiary.

It is also noteworthy that Mr. Randall himself, entering a forum of public discussion, at once puts a question mark against one doctrine announced in this celebrated case, which, however, he does not quote, namely, that "the courts will not hesitate to protect the public from prejudice" by disbarring their obnoxious critics. This is the *ultima ratio regum*, which requires no advocacy and admits no dispute. A public which can accept this doctrine and the "protection" which it confers confesses itself unfit to weigh independently Mr. Randall's implied thesis that the Supreme Court judges do not intend to gag their political opponents. No Ohio lawyer would dare assert the contrary. Plain English on the proposition would not unlikely impress the judges as "indecent and disrespectful," and as tending, in the words of the Thatcher charges, to "cause the people to be inflamed with prejudice against said judges."

With a due sense of the responsibility and possible hazard involved, and being familiar with this affair from the beginning, I beg to submit to your readers that it is not the concurrent press reports, nor the article in your July number, but rather it is Mr. Randall's opinion of the court's opinion, which is misleading.

Mr. Thatcher was not disbarred for libel. The syllabus, to be sure, declares that "no man has a right to degrade and intimidate a public officer, etc., by the publication of libelous matter," but the minor premise, that Thatcher published libelous matter, nowhere appears, expressly or by implication. On the contrary the court say: "The question is not whether his offense might be punished as a contempt, or by prosecution for libel." And again, "It is not necessary that his offense should constitute a contempt or a crime."

The pertinence of this clear disclaimer, in an opinion not otherwise remarkable for clearness, lies in the two facts: First, that if Thatcher stood charged with a libel, he stood charged with a crime (Ohio Rev. Stat., § 6828); and, secondly, that if charged with a crime, the law (Ohio Rev. Stat., § 563) protected him against disbarment and disgrace until a jury had first passed upon his guilt or innocence, and by "conviction of a crime involving moral turpitude" has empowered judges to disbar him for the crime.

Although Thatcher's publication, if false and malicious, was a signal misdemeanor, yet it was never attempted, and probably never contemplated, to give the Supreme Court a sanction to disbar for libel, by allowing a jury first to determine that there was a libel. Hence the more elastic definition which the court gave to Mr. Thatcher's offense, that it was "a lack of appreciation of ethical standards," and "unworthy conduct." It was "moral turpitude," minus the libel which would have made it a "crime."

To have summarily, as a court of first instance, determined the issue of "libel or no libel," and thus to have stripped away the presumption of innocence, and the right of trial by jury, which cloaks an accused citizen, though a lawyer, would have added no lustre to the tribunal usurping the prerogative. But even upon such an issue in such a case, the judges could not, without again revolutionizing the law, have laid upon the defendant the burden "to satisfy the court of the truth of the material charges and statements contained in those publications." The late Justice Cooley (Const. Lim., c. VII.) treats, with a wealth of learning and ability, the law of libel as applied to the discussion of public men and measures, and especially of candidates for office. He says (4th ed., p. 550):

"They (the public) are therefore interested in knowing what is the character of their public servants, and what sort of persons are offering themselves for their suffrages. And, if this be so, it would seem that there should be some privilege of comment; that the privilege could only be limited by good faith and just intention; and that of this it was the province of a

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jury to judge, in view of the nature of the charges made and the reasons which existed for making them."

The tenor of his observations, and of his authorities, which are too long to quote, harmonizes with the following by Pollock, C. B. (15 M. & W. 331–333), which he cites:

"I do not in any degree complain; on the contrary I think it quite right that all matters that are entirely of a public nature — conduct of ministers, conduct of judges, the proceedings of all persons who are responsible *to* the public at large — are deemed to be public property; and that all *bona fide* and honest remarks upon such persons and their conduct may be made with perfect freedom and without being questioned too nicely for either truth or justice."

Upon the fairness of Thatcher's charges against the judge who was defeated, and of the similar charges in the same pamphlet against two of the judges who sat in the disbarment proceeding, every man will have his view, colored probably by his politics.

At the hearing the defeated judge testified to the effect that he was not a corporation judge, not prone to take cases from the jury, not facile with labor injunctions, nor solicitous for a special salary act of which he had been the sole immediate beneficiary. Mr. Thatcher produced evidence, mainly from the records, which he claimed showed the contrary. But these things had in the recent campaign been a theme of public discussion that had handled both the judge and his opponent very freely. The popular verdict was far from unanimous. Prejudice, in one direction or another, is still rife among lawyers and laymen.

But the larger professional public to which your periodical is addressed will not be interested to review such a debate, and still less, if possible, to examine the adventitious props which were braced around the main charge against Thatcher. In Ohio, criticism of a judge running for re-election, unimpeached as a contempt or as a libel, can still serve, by the votes of other judges similarly criticised, to expel the critic, if a lawyer, from his profession. This is the stark, momentous fact. The auxiliary charges become insignificant.

They came into the case irregularly. The prosecuting committee, appointed to "prepare and file" charges and specifications upon the publication alone, volunteered a six weeks' inquest behind closed doors, and of their own motion originated other specifications, upon two of which Mr. Thatcher was found guilty.

One other extraneous circumstance is germane. During the Thatcher proceedings, the Supreme Court judges were shown another circular, bitterly assailing the integrity of a certain other judge, who lately ran in opposition to a candidate of the dominant party, and therewith written charges looking to the disbarment of the known participants in the publication, who were lawyers. The charges were not permitted to be filed.

Had Thatcher published this circular, instead of the particular publication which he did issue, he would have gone unscathed. Had he been guilty of all the other offenses charged against him, and guiltless of the publication, the disbarment proceedings would not have been instituted. Finally, had he been held guilty of the publication alone, and guiltless of the other offenses charged, he would, nevertheless, under the holding of the court, have been disbarred, but for "unworthy conduct," which requires no conviction, and *not* for libel which presupposes conviction by a jury.

BEN W. JOHNSON.

TOLEDO, OHIO.

AMICUS CURIÆ IN DIVORCE CASES.

To the Editor of LAW NOTES:

SIR: In vol. 13, No. 5 [LAW NOTES for August, 1909], at page 82, I notice you refer to the practice of Judge Williams, of one of the divisions of the St. Louis Circuit Court, in appointing an *amicus curiæ* in all uncontested divorce cases, and I infer from the attention given the same that it is considered something of an innovation along these lines.

Allow me to say that this plan was practiced at least eight years ago by Waller W. Graves, then judge of the Twenty-ninth Judicial Circuit of Missouri, and now a justice of the Supreme Court of Missouri. The Twenty-ninth Judicial Circuit is one of the country circuits of Missouri, embracing no city of any great size, and yet it is now ably represented upon the Supreme Court of Missouri by two members, Justice Graves and Justice Gannt.

WM. C. LUCAS.

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Law Notes

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Lack of Confidence in Insanity Experts.

EXPERT testimony on questions of insanity is still in disrepute. Dr. Britton D. Evans, the "brainstorm" expert, says that "much of the adverse criticism on the part of physicians against expert testimony is the direct outcome of professional jealousy and a lack of expert knowledge on the very subject on which they arrogate to themselves the right to pass final judgment." However that may be, the severest criticism may be found in the daily press, the attention of which has been directed to the subject by the apparent abuse of such testimony in recent notorious murder trials. Owing to the usual disagreement among the experts, the usefulness of such testimony has been questioned. The impression seems to be that juries are no longer influenced by the experts' "words of learned length and thundering sound." However, it should not be overlooked that most of the strictures are directed not against the proper use of expert testimony, but against the present manner of using such testimony. The partisanship of many experts is the chief subject of attack. The uncertainty in which the science of mental diseases is still enveloped is favorable to partisanship. Unconsciously an expert who receives a large sum of money for testifying in favor of a litigant is, like an advocate, apt to form a biased opinion. Even the Governor of New Jersey, in an address delivered not long ago, took a fling at the insanity experts who adjust their testimony to suit the needs of the litigants who employ them. By the legal profession the diversity of the experts' opinions has not been deemed a sufficient reason for the elimination of expert testimony from trials involving questions of insanity. To restore confidence in the experts appears to be the purpose of the changes suggested by committees appointed by several bar associations. Their recommendations usually involve the appointment of experts by the court, which is to determine their compensation, or the placing of experts, with respect to fees, on a footing of equality with other witnesses. Legislation along these lines is in force in Michigan. Whatever objections may be urged against the suggested reforms, their adoption may tend to make expert testimony nonpartisan and thus create confidence in experts, without which such testimony can be of no material aid in the trial of insanity cases.

Uniformity in Insurance Contracts.

THE American Bar Association at its meeting in Detroit last August adopted a committee report on the effect of the various State insurance laws. The report, after criticising the general trend of State action through the legislatures and insurance departments as inequitable and hostile to the companies, continues: "Your committee disclaims any purpose to reflect on the motives of the authors of many of the proposed bills introduced in the legislatures of the country since 1906; but with all the emphasis that can be given to words, we condemn bills drawn in the interest of one class of companies at the expense of others; bills to increase the already iniquitous burden of taxation; bills for valued policy laws, by which a premium is put upon fraud; bills to increase the power and importance of the State insurance departments, and bills that merely tinker with the forms of policies, with which our legislative halls have been flooded. Everybody with an axe to grind has been on the watch for a chance to sharpen it on some legislative grindstone at the expense of the companies, which are likewise alert to prevent, if possible, antagonistic legislation. This situation is one that breeds mutual distrust as between the companies and lawmakers; but it is time for insurance to be dealt with on some other basis than by the rules of the prize ring." The report urges the enactment of a bill by Congress directing the appointment of a commission to prepare a model insurance code for the District of Columbia and the Territories. Undoubtedly the conditions deplored in this report constitute a serious evil, but it is not easy to see the way to a complete remedy. If Congress should, as recommended, make provision for an insurance law for the District of Columbia and the Territories, possibly the several States would see the wisdom of adopting the law, and thus some uniformity in insurance contracts throughout the country would gradually be reached. The extensive adoption of the negotiable instruments law shows a conviction among the legislators of the country that greater uniformity in the laws is desirable. The construction placed upon the national insurance contract by the United States Supreme Court would, it seems, carry almost conclusive weight with the State courts in the construction of the same contracts, and thus a fairly uniform body of insurance law would eventually spring up. Hostility to the insurance companies and the preconceived notions of legislators in some quarters would, however, present an obstacle to the general adoption of a uniform law, and discrepancies in the judicial construction of such a law, even if generally adopted, would necessarily arise. The scheme does not promise with much certainty the uni-

formity which is needed, but it offers possibilities which Congress, and in due time the State legislatures, should consider.

A National Insurance Law.

COMMENTING on the report of the Bar Association committee, above referred to, Mr. William B. Ellison, a prominent insurance attorney of New York city, expresses the belief that little or no useful purpose is to be served by the enactment by the various States of uniform insurance laws, inasmuch as each State court would be left free to construe the contract according to its own opinion, and that real uniformity in insurance contracts can only be realized by the enactment by Congress of a national insurance law binding on all the States and subject to construction by the United States Supreme Court. The consummation of this remedy, he admits, presents immense difficulties, and might require an amendment to the Federal Constitution. The enactment of such a law as he suggests would, under our present constitutional government, have to come within the power of Congress to regulate interstate commerce. Congress has the right to define what are the subjects of commerce, subject to the power of the courts to say that the subject legislated upon has no relation to commerce. We have expressions in the opinions of the Supreme Court, in cases arising under State laws, as in *Paul* v. *Virginia,* 8 Wall. 168, to the effect that insurance is not a transaction of commerce. The courts might, however, accept a declaration by Congress that insurance is commerce, and permit a federal insurance law to operate on interstate and foreign insurance transactions. But how could such legislation control the subject except indirectly, as by denying the mails and facilities for interstate transportation to companies not complying with the federal regulations? The situation would be without precedent. In any event, transactions between a domestic insurance company and citizens of the same State would remain subject to the laws of the State. It is safe to say that the insurance law advocated would not be possible except by constitutional amendment.

Disclosure of Confessional Secrets.

A RECENT ruling of a Massachusetts trial court has been proclaimed by some newspapers as an invasion of the secrecy of the Roman Catholic confessional. In an action against a priest, the penitent was allowed, over the objection of the priest's counsel, to testify as to advice given her by the priest during a confession. It is evident, however, that this ruling does not affect the secrecy of the confessional, for according to the well-established rule governing privileged communications, the privilege is that of the penitent, and not that of the priest. Whatever may have been the view of English common-law judges, there appears now to be no disposition to compel the disclosure by priests of confessions made to them. In fact, statutes in many States expressly provide that a clergyman or priest shall not be compelled to testify in relation to any confession made to him in his professional character in the course of discipline enjoined by the rules of his church. Though the question whether independently of statute such a privilege should be recognized has not in recent years been directly presented to the higher courts, it seems that the policy of the law which protects the secrecy of communications between attorney and client and physician and patient embraces priest and penitent. So long as confession of sins may be regarded as a religious duty by Catholics, the compulsory disclosure by priests of confessions made to them would be an unjustifiable interference with religious liberty. But neither confidential communications to a priest who is not at the time acting in his professional character, nor communications in reference to purely secular matters, even if made during a confession of sins, should be regarded as privileged. There is no reason for extending the privilege to facts that are not properly the subject of confidential communication between priest and penitent. Such is the tendency of the decisions wherein the question has been touched upon.

Exit Mr. Jerome.

A PICTURESQUE and puzzling personality passed from public life — temporarily, at least — when William Travers Jerome withdrew from the race for the district attorneyship of New York county. Twice his remarkable powers as a campaigner won the office for him against great odds, but the announcement of his independent candidacy for a third term failed to arouse any very general enthusiasm, and probably he withdrew because he saw certain defeat staring him in the face. The waning of Mr. Jerome's prestige seems to us a strange phenomenon. He has certainly been an able and brilliant prosecutor, and recently he came unscathed out of a searching investigation into his conduct of his office on charges filed with the Governor. There is a very great deal that can be said in his favor, and apparently the most serious charge against him is that he smokes cigarettes. And yet it is undeniable that his erstwhile admirers and supporters have fallen away from him, and that, justly or not, a widespread feeling has grown up that he has been too reluctant to prosecute wealthy and influential malefactors. Whether this impression has any foundation in fact, or is due solely to the baseless innuendoes of his detractors, is a question on which we have not sufficient information to found a belief, though the presumption would seem to favor the latter hypothesis. But be that as it may, the fact remains that Mr. Jerome has lost his grip. It may be he has been overtaken by the same fate that sent Aristides the Just down into — wherever it was. Who knows?

Eminent Lawyers for Defense of Criminal Poor.

MUCH publicity and comment have followed the recent appointment by Judge Malone, of the Court of General Sessions of New York, of three eminent lawyers of the New York bar to defend certain penniless prisoners charged with murder. It seems that a while ago, some over a hundred reputable and successful lawyers of New York city, impressed by the deplorable condition of the criminal bar of that city, and the fact that prisoners without money to employ counsel were not assigned fit counsel, volunteered their professional services when needed in aid of such prisoners. W. B. Hornblower, De Lancey Nicoll, and Samuel Untermyer were among those who volunteered, and they are the three eminent lawyers whose appointment by Judge Malone has caused wide comment. Samuel Untermyer, in accepting his assignment, took occasion to dwell upon the importance of the defense of

life, liberty, and reputation, as compared with the mere championship of money interests, and the fact that lawyers in New York city had been led away from criminal practice by the temptation of money to become highly paid clerks of financiers. In view of the fact that Mr. Untermyer's professional reputation is due to his success in safeguarding large corporate interests, what he says, and the sacrifice he has been willing to make to improve the condition of criminal practice in New York city, ought to have some effect in making lawyers realize their obligations to society and to their profession. The case is well put by the New York *Evening Post,* which says: "If anything else but money counted, if fame counted, for instance, surely the pagefuls of reputation that fall to the share of counsel in many a criminal trial should be attraction enough; of course, fame is transitory, while bank accounts, if treated with consideration, will endure. But if fame offers no inducement, then duty should."

Condition of Criminal Bar Generally.

MR. UNTERMYER'S remarks were intended for New York city, and certain champions of better conditions in other sections of the country hasten to inform the public that such remarks could not be justly applied to those sections. Thus the *Boston Journal* says: "We beg leave to except Massachusetts courts, and especially the courts centered here in Boston, from the charge that the defense of life has been wilfully and wofully neglected. . . . Mr. Untermyer frankly admits that the principal weakness of the bar in this respect may be found in New York; and the reason for that deplorable showing is obvious. Of course, the lifting of standards in New York will have to some extent a beneficial influence on the bar elsewhere. But the point we wish to make is that in this State, and especially in and around Boston, the legal fraternity has, when occasion required, presented some of its most skilful and most eloquent members as advocates both of the people and of the prisoners at the bar." The *Baltimore News,* speaking for the South, says that that section is not generally subject to the indictment brought against the New York bar, but for the reason that "there is not so wide and inviting a field in civil practice in the South as in the North, while, on the other hand, there are more criminal cases which attract the attention of a whole community."

The Passing of Co't Day in Virginia.

THAT committee of the American Bar Association which so light-heartedly proposes to cure all the ills that litigants are heir to by abolishing all the existing courts and starting a fresh lot, would do well to ponder over an unforeseen and lamentable consequence which has flowed from a relatively trivial change in the court system of Virginia. When a few years back — in 1902, to be exact — that commonwealth adopted a new constitution, the old-time county courts were abolished. Doubtless the members of the convention did not pause to reflect that they were incidentally striking down one of the most cherished institutions of the rural population, but all the same they were.

Previous to that time county court day had been the event of the month at the various county seats, being the occasion not only for the dispensation of justice, but for social doings and the transaction of business as well. Then it was that the farmers of the county were wont to forgather to swap views and horses; to discuss the crops, the weather, and other matters of local or general interest; and, if a political campaign was on, to attend to the necessary horse-shedding. Drummers from the cities were on hand with their samples to tempt the cross-roads storekeepers; traveling fakers and venders of catchpenny trifles rent the air with their cries; while, of course, the dispensers of the Demon Rum drove a roaring trade. In short, it was a day to be marked with a white stone.

But with the passing of the county courts the monthly gatherings came to an end, and the Virginia farmers have ceased not to mourn their loss. In Louisa county an effort has lately been made to resuscitate the custom by designating as "salesday" the second Monday in each month — which was the day on which the county court used to be held — and the attempt is said to have met with a fair measure of success. But ready-made substitutes for venerated institutions rarely prosper, and it remains to be seen whether "salesday" can ever be made to take the place of "co't day" in the affections of the agricultural gentry of the Old Dominion.

Wherefore we would once again admonish that adventurous committee of the American Bar Association to have a care lest haply it find itself treading holy ground with its shoes on.

Statutory Prohibition of Use of Automobiles.

STATUTORY regulation of automobiles and automobilists is common enough, but, even in these modern times of excessive and over-zealous legislation, the absolute prohibition of the use of automobiles within certain territorial limits is a novelty. The fact, however, that such laws have been enacted in some localities, renders it almost certain that other legislators will follow the example set for them, partly because of the inordinate desire of the people's representatives to legislate concerning subjects, if such can be found, not already indexed in the statute books, and partly because of the widespread and deep-rooted prejudice against motor vehicles, a prejudice for which the drivers of such vehicles are themselves largely to blame. The validity of statutes of this character gives promise therefore of becoming a question of considerable importance, and it is interesting at this time to note that two courts have lately affirmed the constitutionality of prohibitory legislation directed at automobiles. Very recently the Supreme Judicial Court of Maine upheld an enactment forbidding the use of automobiles in Bar Harbor. The opinion of the court has not yet been reported, however, and comment thereon must consequently be deferred. The other decision was handed down by the Supreme Court of Prince Edward Island in June last and is reported in the Eastern Law Reporter of Canada, volume 7, page 212. The point involved in that case was the power of the legislature of Prince Edward Island to enact a statute prohibiting the use of motor vehicles upon the public highways of the Province. It was contended that the act in question trenched upon the criminal law, legislation in regard to which is, by the British North America Act, assigned exclusively to the federal parliament, and that in consequence the act was *ultra vires* the provincial legislature. In reference to this contention, Sullivan, C. J., said: "But as I view this matter no question of trenching upon the criminal law is involved in it. Quite apart from

the circumstance of the use of automobiles being, or not being, a nuisance, even supposing them to be of the utmost utility, still there surely is in Canada some legislative authority that has power to enact that they shall be prohibited from running on the highways in Prince Edward Island; and the sole question in this case is whether that authority is vested in the provincial legislature or in the Dominion Parliament. That question, it will readily be perceived, is altogether distinct from anything concerning the application or nonapplication of the criminal law." The ultimate holding of the court was that the statute was not an *ultra vires* act, since the construction, repair, management, and control of the highways in Prince Edward Island are matters of a local or private nature in the province and come within the classes of subjects enumerated in the British North America Act as exclusively assigned to provincial legislatures. The case, while an interesting one, cannot be regarded as a valuable precedent, otherwise than locally. The discussion in the opinion is directed almost exclusively to the right as between legislatures to deal with a particular subject of legislation. Aside from the statement of the court in the passage quoted above to the effect that there must be some legislative power in Canada to prohibit the running of automobiles on the highways, and the subsequent remark near the close of the opinion that "it was competent for the legislature of Prince Edward Island to deal with the provincial highways in the manner in which it has done," there is nothing said in the case as to the propriety or validity of the statute itself as an exercise of the legislative power. The question might, of course, arise in the United States as to the respective powers of State and municipality to legislate concerning automobiles, but the issue much more likely to be raised is the power of any legislature to prohibit absolutely the use of automobiles within its jurisdiction. Respecting this latter question, the Canadian decision, as has been said, is not enlightening.

An Acquittal for Killing to End Suffering.

THE possibility of an acquittal for murder where the only defense interposed is that the accused committed the act at the request, and in order to end the hopeless sufferings, of the deceased was illustrated in a recent trial in Paris. The accused had killed his wife, and testified in his own behalf that she had long suffered from asthma, that she could not sleep or rest, and that finally, in response to her appeals, he shot her to put an end to her misery. He was found not guilty by the jury. It is reported that the judge censured them for their verdict, and we take it that the verdict was the result of the misguided emotions of the jury and not one which upon the evidence they had a right to render under the laws of France. The more sensitive of the antagonists of "euthanasia," as the painless killing of hopelessly sick persons is called, may see in this verdict some cause for alarm. A Boston newspaper makes a vigorous protest against the acquittal of a murderer on such a ground, and urges a number of perfectly valid reasons why the facts of this case afforded no adequate excuse for taking the victim's life. We can reassure any who regard this case as in the nature of a dangerous precedent. It is manifestly nothing but the freak verdict of a jury. That such a verdict could be reached in an American court is almost inconceivable. At first thought it might seem that malice, which is an essential ingredient of the crime of murder, could be rebutted by proof that the slayer did the killing not only without ill will toward the victim, but with a beneficent purpose. But, as every lawyer knows, legal malice is not hatred or ill will, but the absence of a legal excuse or justification for the act done. The law recognizes no such excuse for taking human life as that the person slain is incurably diseased and desires death. Accordingly in our practice if a person charged with murder admitted that he did the killing, evidence that he did it at the request of the deceased to end hopeless suffering would surely be excluded by an alert and competent judge, as having no bearing on the question of guilt, and would never reach the ears of the jury, or, in any event, the jury would be pointedly instructed to disregard such evidence. Of course a verdict of acquittal would be final because of the law of jeopardy, but the well-known willingness of juries to be guided by the positive instructions of the court in such a clear-cut matter as this can be relied on to prevent a miscarriage of justice.

Papal Dispensations for Divorce.

THIS letter commands our attention:

On page 128 of your October issue is this statement: "Hence in Catholic countries, Roman at least, so long as the Church is the controlling political power the marriage tie is indissoluble except by special dispensation of the Pope." I have long admired the facilities that your journal evidently has for the investigation of ancient precedents as well as of current decisions. I therefore hasten to ask you to favor me and some other of your readers, who I am sure are surprised equally with myself, with the authority for this statement. When you cite these cases of special dispensations of the Pope dissolving the marriage tie I assure you that I shall examine them most eagerly. I have heard statements similar to this one which you have printed, but I have looked in vain so far for the citation of a single authority supporting them.

We are constrained to believe that our learned and esteemed correspondent would dig a pit for us. Former Justice Brown (for it is in his address, and not in the editorial columns of LAW NOTES, that the sentence quoted occurs) certainly spoke loosely. So does Bishop in his work on the Law of Marriage and Divorce, and so do some other writers of prominence. There is abundant reason, however, for this looseness of utterance. All scholars acquainted with the history of the question know that the Roman Church does not countenance divorce as such, but they also know that for centuries it nullified marriages to an extent and for reasons which practically amounted to a limited cognizance of divorce. The impediments to a legal church marriage were extended on occasions to an amazing degree and grew into a cumbrous system understandable only by the most astute canonical lawyers. The degrees of consanguinity alone were carried so far that the prohibited circle was absurdly wide. When prohibited marriages were contracted, the Pope, or others acting with his authority, could dispense with the rules of the Church, and this was done frequently, with or without reason. Woolsey's Essay on Divorce, p. 122, Scribners, 1869. Separations, by sentences nullifying the marriage, were formerly called divorces. Ib. 124. History abounds with separations of this kind. Technically they were not divorces or dissolutions of marriage, but decrees of nullity. They emanated from the ecclesiastical courts, which administered the canon law. The Pope, with his power of

declaring this law, hearing appeals, construing the Church restrictions, came to have what in fact amounted to a power to confirm or dissolve marriages. Is it not thus that we read of dispensations for "divorce" in the works of historical and legal writers, who grasp the substance and not the form of the papal power?

Lawyers and the Godly Life.

Now comes a Western lawyer, described, of course, in the newspaper dispatches as "prominent," and delivers a body blow at the legal fraternity by arising in a revival meeting and announcing his intention of giving up the practice of law in order that he may in the future lead a godly life. Lawyers are compelled to lie, he is reported to have said, in order to be successful in their profession. And this is not the worst of it. They are also obliged to suborn perjury in witnesses and connive at the violation of the oaths of others as well as of themselves. In short, there is no health in them.

What a parlous state the legal profession is in, to be sure! We did not suspect that it was so bad. We know that both St. Paul and Dr. Lyman Abbott gave up the active pursuit of legal practice in order to turn their whole attention to religious instruction, but we never heard that either of them anathematized his former profession, and the latter gentleman is on record, within very recent times and without evidence of contrition, as having publicly declared himself to be a lawyer as well as a clergyman. We also know a professor in a New York law school who is really "prominent" as a practitioner and who is considerably in demand on Sundays as a lay preacher of the Methodist Church. How these gentlemen — at least the two last mentioned — will hang their heads in shame when the disgraceful truth about their nefarious practices becomes known! And what of the thousands of other lawyers in the land who pose before the deluded public as churchmen and even church officers of the various denominations!

The press dispatch says that the Western lawyer's pronunciamento was "the climax of an evening of religious exaltation." Perhaps this may account for a good deal.

Lazy Lawyers.

It seems now to be the lazy lawyer who is responsible in a large measure for the law's delays. At least, such is the charge made by the trial judge in a Pennsylvania court recently, who is reported to have excused a jury with the following remarks: "You can see, gentlemen, we are on hand ready to proceed with the dispatch of business, and have been all week, but this is the second time we have been compelled to close down because attorneys interested have failed to appear. We are the subjects of criticism at the hands of people on the street as well as through the public prints on account of the delay in business. We place these cases on the list for trial at certain times at the suggestion of the attorneys interested, and when they have us fix the date at which we will be ready to hear them they fail to appear or send any reasonable and legitimate excuse. This condition of affairs should not be permitted to continue, and some radical change should be made. When the attorneys interested fail to appear at the proper time with their witnesses they should at least have the courtesy to inform the court why they are not ready to proceed. Sometimes they have a legitimate excuse in the illness of their clients or their inability to locate important witnesses, but they fail to inform us of these facts, and we are compelled either to place the case at the bottom of the list or possibly continue it indefinitely. The case which you were sworn to try, I understand, originated about three years ago and should have been disposed of long before this. As it is, we will excuse you until Monday morning and will place this case the first one on the list, when, if the attorneys are not ready, we will throw it out of court."

With due deference to the learned judge who draws the foregoing indictment, we cannot feel convinced that the lazy lawyer charge is proven. The practice of failing to proceed with a cause set down for trial on a certain day is annoying to the court and is likely to be costly to the State. Still more reprehensible is the failure to notify the court of the intention not to proceed with the trial. But it is highly improbable that there is any general tendency among attorneys towards such a course of conduct, and it is still more improbable that such practices would be tolerated by the bench for any appreciable period of time. There is, it is true, a very common custom among attorneys, of postponing the trial of causes by agreement, or, in technical parlance, of permitting cases to "go over the term." But this custom is accompanied by no discourtesy to the presiding judge and no expense to the State, for a cause so postponed is rarely if ever one which has been set down for trial on a particular day. There is no "law's delay" under such circumstances. The actual delay in disposing of such litigation is of no interest to the public. It is a matter which concerns, at most, the litigants themselves and their respective counsel.

A New Kind of Disorderly House.

The New Jersey Court of Errors and Appeals has recently rendered a decision of unusual interest. It appears that a man named Martin was the manager of a chattel loan company in Trenton. Persons who applied for loans were informed by him that the money loaned belonged to a woman who resided in a small town in Illinois, and that the loan company was required to guarantee the lender the repayment of the money. Ostensibly as charges for guaranteeing the loan and for drawing the necessary papers, large sums of money in excess of the legal rate of interest were exacted by him. Under the New Jersey statutes the only penalty attaching to a usurious transaction is that the lender cannot enforce the payment of any interest on his loan, and in case usurious interest has been paid the borrower is entitled to have the amount of the interest deducted from the principal. Manifestly such legislation is inadequate to put a stop to usurious transactions. At any rate, the statutes did not interfere with the extortionate rates of interest exacted by Martin on loans ranging from ten to two hundred dollars. The authorities hit upon the plan of indicting Martin for keeping a disorderly house, and in view of an earlier decision of a New Jersey intermediate appellate court, he was convicted. It was this conviction that was affirmed by the Court of Errors and Appeals. *State* v. *Martin,* 73 Atl. Rep. 548. To be told that a place where usurious transactions are carried on is a disorderly house seems startling. As suggested by the adjective "disorderly," the common-law definition of disorderly house involves the element of the disturbance, annoyance, or scandalizing of the public,

the neighborhood or passers-by. There is, however, a line of decisions to the effect that any place in which illegal practices are habitually carried on is a disorderly house. Martin's place of business was held to come within this definition, though it may be safely asserted that outside of New Jersey the habitual acceptance of usurious interest has never been held to amount to keeping a disorderly house. The court was of the opinion that the illegal practices which convert a place into a disorderly house need not involve criminality or moral turpitude, pointing out that, though the sale of intoxicating liquors is not criminal *per se* and does not involve moral turpitude, a person who conducts a place in which the unlawful sale of intoxicating liquors is habitually carried on may be guilty of keeping a disorderly house. It may be observed that the illegal sale of liquor involves disorder or annoyance to the public, which is not connected with the taking of usury. At the same time it must be admitted that the attempt to rid the community, by means of existing legal principles, of so great an evil as "chattel loan sharks," is commendable. The principle of the decision seems to be of far-reaching importance, and may, if adopted by other courts, prove to be an effective remedy in dealing with a variety of circumstances under which the law is habitually violated.

The Panama Libel Cases.

The Panama libel cases which President Roosevelt caused to be instituted against the proprietors of the Indianapolis *News* and the New York *World* have fallen very flat. United States Judge A. B. Anderson, of Indianapolis, has discharged the proprietors of the *News* in the proceedings brought by the government to take them to Washington for trial. In orally announcing his decision he is reported to have spoken as follows: "That man has read the history of our institutions to little purpose who does not view with apprehension the success of such a proceeding as this, to the end that citizens could be dragged from their homes to the District of Columbia, the seat of government, for trial, under the circumstances of this case." Lawyers, whether supporters of the former President or not, will generally approve the decision. The case was one which never should have been taken up by the government. Officials wrongly accused of corruption have a clear remedy, but a libel upon the United States is a matter which, in this day of the utmost freedom of criticism, does not appeal to one as being in any way serious. A government has no business to be thin-skinned.

AMENDING THE FEDERAL CONSTITUTION.

The somewhat popular demand for the election of United States senators by direct vote of the people has resulted in some of the legislatures of the States taking action to bring about an amendment of the Constitution of the United States to that end. Without regard to the wisdom of the purpose to be accomplished, the method adopted by the State legislatures may be of some importance, and I venture to suggest some points in this connection which have occurred to me, and, although they may have been well considered by others, I do not recall any discussion of them.

On the subject of amendments, the Constitution of the United States reads as follows:

"Article V.

"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

All of the amendments to the Constitution of the United States which have thus far been adopted originated with Congress and not with the legislatures of the States, and hence there is precedent as well as law for that method of amendment, but there is no precedent to regulate the procedure or details of adopting an amendment applied for by the legislatures of two-thirds of the States, and the meagre provision of the article of the Constitution quoted above is the written law upon that subject.

It will be seen that when Congress takes the initiative and proposes an amendment no national convention can be called, but when the legislatures of the States take the initiative and apply to Congress for amendments a national convention becomes a necessity. For such a national convention there is no precedent, and there are no accepted rules for its constitution or government. Representation in such a convention and the relative strength of the States in its deliberations have not been fixed. Since Congress must call such a convention it will probably have the power, by necessary implication, to provide the details for assembling the convention, and incidentally to prescribe the qualifications of voters who may participate in the selection of delegates. If such be the case, the question arises, what qualifications will Congress prescribe? Will it provide the uniform qualifications recognized by the Constitution and laws of the United States, or will it recognize the qualifications provided by the several States? This subject involves questions which are entirely new, and it is not probable that the view of Congress as to the qualifications of voters will be the same as that entertained in some of the States, at least upon the subject of amending the Constitution of the United States.

Again, the voting strength of each State in such a national convention must be determined in some way. In the absence of regulations or precedent on this point must Congress, the only authority which can call the convention, determine this matter, or will the convention itself determine it? If Congress deals with the question, will the voting strength of each State in the national convention be fixed by analogy to the electoral college, or how will it be fixed? If the convention itself be left to deal with the question, then the voting strength of each State in the convention will be the first question before it, and how will the vote be taken on that first question? Will such first vote, by analogy to a vote of the law-making body, the Congress, be a majority vote of the members,

or how will the first vote be taken? This question arose in the first and only national constitutional convention which the country has had, and it was not settled there, but, by reason of the great necessity of the times, was practically avoided, and the Constitution of the United States, as finally adopted, shows on its face that it was adopted "by the unanimous consent of the States present," and hence there is no precedent found in the first and only national convention on the subject of each State's strength therein, which could now be made assuredly applicable. At the time this first convention came together the States were not irrevocably bound in a common union, and it was contemplated, and was necessary, that each State which was to be bound by the Constitution should ratify it, as was afterwards done. In the very nature of things any constitutional convention called under Article V., above quoted, must be unlike the first convention.

The amendments proposed by a national convention must, as will be seen from the quoted provisions of the Constitution, be ratified by three-fourths of the legislatures of the several States or by conventions in three-fourths of the States as Congress may propose. Article V. of the Constitution was changed several times after its introduction and before its final adoption by the convention, and the provision relating to amendment by a national convention was inserted as a precaution against a possible oppressive government. Mr. Mason argued, at the time, that no proper amendment would ever be made if the government should become oppressive unless some provision were inserted so that the method of amendment should not be entirely dependent upon Congress, and in response to this argument Gouverneur Morris and Mr. Gerry suggested the existing provision for a national convention. In view of this, might not Congress reach the conclusion that a legal application by the legislatures of the States to amend the Constitution, a thing which can only be accomplished through a national convention, was founded upon distrust of the Congress and a desire to have amendments proposed and ratified by conventions fresh from the people and as free as possible from the power of constituted authority, federal or state; and, having the clear constitutional power, submit the amendments proposed by the national convention to State conventions for ratification? In that event, may not Congress fix the qualifications of members of such State conventions and prescribe by whose votes they shall be chosen?

These matters might not be of great importance if it were certain that the legislatures could name the amendments to be proposed and that the national convention could deal with no other amendment, but it will be seen that the Constitution does not authorize the State legislatures to propose the amendment. They are authorized only to apply to Congress to call a national convention, and this convention itself proposes the amendment. Once the convention has been legally called, it would seem that it may propose as many amendments to the Constitution as it desires, and that it would not be bound to propose an amendment offered by the legislatures of the States or by any one else. It is not probable that two-thirds of the States desire a national convention, at this time, with power to propose as many amendments to the Constitution as it sees fit, and to have such amendments ratified by the legislatures or by State conventions "as the one or the other mode of ratification may be proposed by the Congress;" and hence it seems to me that the method adopted by the legislatures in furtherance of the cause of popular elections of senators is one of serious importance, and suggests the consideration: Shall State activity on the question be along the line of memorializing Congress in such way as to avoid the effect of a legal application for a national convention, resulting if possible in an inducement to Congress to submit amendments to the several legislatures in the manner uniformly followed up to this time, or shall a legal application for a national convention be made?

I am not familiar with any of the resolutions adopted or introduced in the legislatures of any of the States on this subject except the one adopted in Alabama, but it is probable that they are all substantially alike. The Alabama resolution reads as follows:

Whereas, Article 5 of the Constitution of the United States provides that whenever two-thirds of both houses (of Congress) shall deem it necessary, the Congress shall propose amendments to the Constitution, or, on application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes;

And whereas, the legislatures of twenty-seven States have applied to the Congress of the United States for the submission to the States of an amendment to the Constitution providing for the election of United States Senators by direct vote of the people:

Therefore, be it resolved by the House of Representatives, of the Legislature of Alabama, the Senate concurring, that the Sixty-first Congress of the United States is requested, and by this resolution application is made by the Legislature of the State of Alabama to the Congress of the United States in its sixty-first session, to submit to the several States an amendment to the Constitution providing for the election of United States Senators by a direct vote of the people.

Resolved further, That a copy of this resolution be certified by the clerk of the House and secretary of the Senate to the speaker of the House and the president of the Senate of the United States.

Approved August 13th, 1909.

As will be seen, the Alabama resolution is inaptly drawn. The preamble and part of the resolution indicate a purpose to make a legal application to Congress to call a national convention, but it concludes by specifically asking Congress to submit the proposed amendment to the legislatures of the States. Congress could, of course, submit an amendment proposed by a national convention to the legislatures of the States for ratification instead of submitting it to conventions in the States; but taking the resolution as a whole, it will be construed, most likely, as a memorial expressing the desire of the legislatures rather than as a legal application for a national convention.

If the application is not a legal application under the Constitution for a national convention, it will have no binding force upon Congress, and Congress could not, in that event, call such convention. The moral effect of such a resolution upon Congress would doubtless depend upon the number of States adopting it. If the legislatures of the States, while dealing with the question under popular demand, see fit to avoid the legal application for a national convention, Congress will probably not care to take notice of such action unless the resolution be adopted by the number of States necessary to finally ratify the amendment, that is, three-fourths of the States, since any demand short of this might result in expense and agitation and not in the proposed amendment.

TIPTON MULLINS.

ARGUMENTATIVE ANTICS.

WHAT are the limits of propriety with respect to the arguments in which counsel presenting his case to a jury may indulge?

It may be that the average layman, with a knowledge on the subject chiefly gained from newspaper accounts of more or less notorious trials, would be somewhat surprised to learn that there were any; and probably few members of the legal profession, while recognizing, of course, the well-known broad general rules governing the subject, would undertake to give an accurate off-hand answer to such a question. Indeed, even the courts of last resort in various States have declined to draw the line with any degree of precision, declaring that counsel must of necessity be allowed much latitude in this regard.

As early as 1852 Judge Nisbet, of the Supreme Court of Georgia, said: "The range of discussion is wide — very wide. . . . His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wing to his imagination. . . . It has been found difficult to prescribe a legal limitation to the lawyer's liberty of speech in the performance of his duties in a cause. That the discussion should be free is perfectly obvious; and even abuses should be tolerated, rather than a privilege so valuable should be abridged." *Mitchum* v. *State,* 11 Ga. 615.

This language has been quoted frequently in discussions of the question of counsel's argumentative privileges, but is generally credited to Fowler, J., of the New Hampshire Supreme Court, who seems to have adopted it (without quotation marks or other acknowledgment, however) in his opinion in *Tucker* v. *Henniker,* 41 N. H. 317, decided in 1860, and regarded as the leading case on this question.

More recently an Iowan judge said: "Within reasonable limits, the language of counsel in argument is privileged, and he is permitted to express his own ideas in his own way, so long as they may fairly be considered relevant to the case which he has made. No lawyer has the right to misrepresent or misstate the testimony. On the other hand, he is not required to forego all the embellishments of oratory, or to leave uncultivated the fertile field of fancy. It is his time-honored privilege to

> "'Drown the stage in tears,
> Make mad the guilty and appall the free,
> Confound the ignorant, and amaze, indeed,
> The very faculties of eyes and ears.'

Stored away in the property-room of the profession are moving pictures in infinite variety, from which every lawyer is expected to freely draw on all proper occasions." Weaver, J., in *State* v. *Burns,* 119 Ia. 663.

The "moving picture" privilege seems to have been exercised to the utmost by a strenuous Kentuckian prosecutor in a homicide case. The evidence tended to show that the deceased was knocked senseless by a blow with a rock, and then beaten over the head with a billet of wood. In summing up, the State's representative tried to re-enact the tragedy before the jury, impersonating the deceased, and, as the report says, "laid (*sic*) down upon the floor and holloed at the top of his voice, 'Dan Owens, come here and strike me with that club,' and called upon others to come and strike him with a 'board heart.'" It does not appear from the report of the trial that the defendant or any one else accepted his invitation to act the part of which the former was accused in this realistic scene, so that it was presumably a monologue. But the jury seem to have been duly impressed, and promptly convicted the defendant.

On appeal this dramatic performance was assigned as error. But the Supreme Court of Kentucky was of opinion that counsel did not exceed his rights in employing, if he saw fit, such a means of illustrating his argument, and declined to interfere with the verdict, adding, however: "This was an unusual position for counsel to assume in arguing to a jury. Still the court cannot attempt, in a matter of that kind, to regulate counsel in his effort to demonstrate a proposition" — the first part of which statement, at least, it is certainly to be hoped is correct. *Owens* v. *Com.,* 58 S. W. Rep. 422.

Exaggeration may be indulged in freely, so long as no positive misstatement is made, or matter not in evidence injected into the case as a fact, for where the argument is within the evidence "mere exaggerated language will not work a reversal if permitted by the trial court." *Kain* v. *Bare,* 4 Ind. App. 440. And counsel can employ sophistries, however insidious and seductive, as "it is not cause for a new trial that counsel in the case make an illogical argument." Woods, J., in *Morrison* v. *State,* 76 Ind. 335, 337. "Illogical conclusions from facts proved may be insisted upon, and there is no remedy." Bradford, J., in *Inman* v. *State,* 72 Ga. 269.

One of the general rules previously adverted to is, of course, that which proscribes inflammatory arguments and appeals to passion and prejudice. Yet the time-honored tears, crocodile or otherwise, of crying counsel, alluded to by Weaver, J., in *State* v. *Burns* (*supra*), are a familiar sight in trial courts. "Tears have always been considered legitimate arguments before a jury, . . . and we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel, which no court or constitution can take away. . . . Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court." Wilkes, J., in *Ferguson* v. *Moore,* 98 Tenn. 342.

So it would seem that counsel, at least so far as his own weeping is alone involved, has practical *carte blanche.* Perhaps the limit is to be found only when he is assisted in this feature of his appeal. It might well be considered crowded in the case of an Iowan lady who sued the sheriff to establish her title to two horses and a wagon which had been seized by him under an execution against her husband in favor of certain of his judgment creditors. The evidence showed that the plaintiff's husband, a soldier in the Civil War, was dead. Her counsel, endeavoring to make the most advantageous use before the jury of this misfortune, and doubtless with a sense of his own lachrymal deficiencies, was ably reinforced in this respect by his client. She sat close to him and the jury, facing the latter, during his impassioned appeals on her behalf, in which he denounced the judgment creditors as "leeches and oppressors of poor women and widows;" and when he descanted upon her widowhood and dead soldier-husband, the report states, she was seen "to weep or pretend to weep." It is hardly surprising that the jury found a verdict for her.

The defendant appealed, but the appellate court could not find that this duet jarred the harmonies of justice, and affirmed the judgment. "Great latitude is allowed," they said, "in appealing to the sympathy of the jury in the arguments of counsel. That, and the widow in tears, are a kind of stage performance which courts cannot very well, and perhaps ought not to attempt to, control." *Dowell* v. *Wilcox,* 64 Ia. 721.

In a Texas homicide case, however, the zealous prosecuting attorney, in his anxiety to obtain a conviction, seems to have exceeded the lachrymal bounds. He sought to strengthen his appeal to the jury by bringing forward, when he began his address, four little children of the deceased, whom he ranged on a bench within a few feet of the jurymen and in full view

of them. There they remained, sobbing and crying copiously, while the State's representative recounted the distressing details of their late father's untimely demise. "Guilty," said the jury.

On appeal the Supreme Court of Texas said: "We cannot but regard this as an unwarranted attempt to influence the jury by bringing the deceased's weeping children before them to inflame and excite their sympathy. This character of sensational display ought never to be permitted in the courts of justice, neither for the State nor the defendant." But the point was not considered to be properly raised, as objection had been made only to the remarks of counsel and not to "the singular performance of bringing the children in front of and close to the jury during the closing argument of the State." And inasmuch as the defendant's counsel had appealed to the jury for sympathy for the children of the defendant, the court concluded that "both were perhaps improper, but the one was an offset to the other." The conviction was accordingly affirmed. *Furlow* v. *State,* 41 Tex. Crim. Rep. 12.

Some of the courts when considering this question have intimated that in the majority of instances professional ethics may be safely relied upon to prevent excesses of this character.

"The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession." Wilkes, J., in *Ferguson* v. *Moore* (*supra*). This is undoubtedly true. But the minority is always to be reckoned with, and it is obvious that practices of the nature above discussed must in many instances have had an important part in the determination of jury cases. Yet an apparent miscarriage of justice, through the unexpected decision of the trial jury in a case attracting general public notice, is usually followed by much adverse criticism of the jury system in general and those immediately concerned in particular, which leaves entirely out of account the possible part played in the result by the argumentative antics of the counsel engaged. But this element should not be lost sight of in view of the opportunities afforded by the great latitude allowed in this respect, the possibly perfervid appeals and plausible sophistries eloquently urged upon the jury, perhaps, by attorneys on either side of the cause if methods akin to those referred to be employed. And in such a case it is scarcely to be wondered at if a body of mere laymen, wearied by the tedium of the trial and bewildered by a mass of tangled testimony, should occasionally be led astray by the rhetorical pyrotechnics of those for whose superior intellectual abilities they may feel an unwarranted respect, and render a surprising verdict from the point of view of the actual facts of the case. Indeed, there would seem to be a solid basis for the suggestion of counsel's share of the responsibility for such occurrences, especially when it is considered that only a small proportion of the "twelve good men and true" need be so affected to cause a disagreement or a verdict startling or even grotesque to those unaware of the extent of the handicap under which they may have labored through the use of such argumentative tactics by zealous counsel. S. S., JR.

IS THE AUTOMOBILE A DANGEROUS MACHINE?

A CONSIDERABLE number of decisions seem to settle the rule that an owner of an automobile is not liable for injuries caused by the negligent operation of his car by a person without his sanction or consent. This rule is chiefly exemplified in the case where an employee, though intrusted with the care of the automobile, uses it for his own business or pleasure without the sanction or consent of the owner. The reader will find a full collection of the cases upon this point in notes to two cases reported in the American and English Annotated Cases; *Lotz* v. *Hanlon,* (Pa.) 10 Ann. Cas. 731, and *Mattei* v. *Gillies,* (Ont.) 12 Ann. Cas. 970.

Where, however, an automobile is used by one with the sanction and consent of the owner, but not on the business of the owner, thereby not rendering the operator the agent or servant of the owner in such operation, the question has lately arisen whether the statutes regulating the operation of automobiles render the owner liable for injuries caused by the negligence of the operator. In the absence of any statute regulating the operation of automobiles, it would seem that they should be placed on the same plane as any other vehicles for use upon the highways, and the owner would incur no liability where he loans or hires his automobile to a third person for injuries caused by the latter's negligence; and in a number of cases it has been so held. Thus in *Cunningham* v. *Castle,* 111 N. Y. Supp. 1057, the Appellate Division of the Supreme Court of New York in the majority opinion, *per* Clarke, J., says that "an automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun or a sailboat or a motor launch." And it was held that an owner of an automobile by consenting to its use by a third person did not render himself liable for the injuries caused by the negligent operation of the automobile by such person. The court in this case, however, does not refer to the statute regulating the operation of motor cars. Again the same conclusion was reached in *Maher* v. *Benedict,* 123 N. Y. App. Div. 579, without reference to the statutes. So also in Doran *v.* Thomsen, 74 N. J. L. 445, the same conclusion was reached by the court without reference to the statutes, the court saying: "The first and third counts plainly disclose no cause of action. They are apparently based upon the erroneous assumption that because the defendant loaned his motor vehicle to some one over whom he had no direction or control at the time of the accident he shall be held liable for the mere loaning. But no such liability rests upon him. An owner of a vehicle is not liable for an injury caused by the negligent driving of a borrower, if it was not used at the time in the owner's business. *Herlihy* v. *Smith,* 116 Mass. 265; *New York, etc., Railway Co.* v. *New Jersey Electric Railway Co.,* 31 Vroom 338, *affirmed* 32 Id. 287." See also in this regard *Ottomeier* v. *Hornburg,* (Wash.) 97 Pac. 235.

In *Ingraham* v. *Stockamore,* 118 N. Y. Supp. 399, however, it was expressly held in view of the statute regulating the operation of automobiles that the owner was liable for the injuries caused by the negligence of another operating the car with the consent of the owner. Spencer, J., on motion for a new trial in regard to an instruction "that the owner of an automobile should be responsible for injuries caused by it by the negligence of any one whom he permits to run it in the public street," said: "The legal proposition contained in this instruction is, no doubt, a novel one, but finds full justification in the novelty of the situation. The responsibility which should be imposed upon owners of automobiles must be measured by the character of the machines, the place where they are used, and the dangers attending their use. Automobiles are dangerous. The statute (Motor Vehicle Law, Laws 1904, p. 1311, c. 538) requires that every person acquiring an automobile shall, for every such vehicle owned by him, file in the office of the secretary of state a statement of his name and address, with a brief description of the vehicle to be registered, including the name of the maker, factory number, style, and motor power. Also every owner is required to have a number, assigned by the secretary of state, displayed on the back of the car in such a manner as to be plainly visible. Unregistered automobiles are prohibited from being used upon the highway. The statute also provides that every person acting as chauffeur must make application to the secretary of state, giving his name and ad-

dress and the trade name and motive power of the vehicles he is able to operate, and this also must be filed in the office of the secretary of state. Upon such filing the secretary of state is required to furnish such chauffeur a badge, properly stamped, which badge shall be worn by the chauffeur, pinned upon his clothing in a conspicuous place, at all times while he is operating his machine. No unregistered person is permitted to act as chauffeur, nor may one authorized permit another to make use of his badge, under penalty of fine and imprisonment. It would seem, from these provisions in reference to the owners of automobiles and those who operate them, that the legislature regarded automobiles as dangerous machines, and that their owners should be under special liabilities for the manner in which they operate them. No such restrictions have ever been imposed on other methods of transportation on highways. It is absurd to say that an automobile is no more dangerous than a team of horses. The latter have been used time out of mind, and comparatively few accidents have occurred, and those mostly to the ones using the horses. During the few years that automobiles have been in use fatal accidents have been of almost daily occurrence, and automobiles have come to be regarded in both city and country as a menace to people on the highway. Their rapidity and the stillness of their movements make them especially dangerous to pedestrians. Attempts have been made by law to limit their speed, but it has been impossible to enforce the law. No doubt the legislature had in mind these facts when making the provisions of the act. Such provisions, requiring the registration of the names of the owner and chauffeur and the number of each machine, can have but one purpose — to enable identification of the persons responsible in case of accident. An automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by any one with his consent. He may not deliver it over to any one he pleases and not be responsible for the consequences."

And in *Mattei* v. *Gillies,* 16 Ont. L. R. 558, 12 Ann. Cas. 558, the court after holding the owner liable for injuries caused by the negligent operation of an automobile, on the ground that the relation of master and servant existed between the owner and the operator, said in reference to the statutes regulating the operation of automobiles: "Besides this I am inclined to hold that, having regard to the provisions of the act, as to registration of the owner, the carrying of a number on the machine for the purpose of identification, and the permit granted on those conditions, as between the owner and the public, the chauffeur or driver is to be regarded as the *alter ego* of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor." In analogy to the decisions holding, by reason of the statutes regulating the operation of automobiles, the owner liable for the negligence of one operating it with his consent, the lessor of an ordinary railway or street railway is held in most jurisdictions liable for the negligence of its lessee in the operation of the railway. See the titles Railroads, 23 Am. & Eng. Enc. of Law (2d ed.) 784 *et seq.;* Street Railways, 27 id. 47. And in England under the London Hackney Carriage Acts 1843 (6 & 7 Vict., c. 86) regulating the public plying of carriages for hire, the registered proprietor of a hackney carriage is held liable for injuries caused by the negligence of a person to whom such proprietor rents the same, though no relation of master and servant exists between the parties. *Keen* v. *Henry,* (1894) 1 Q. B. 292; *King* v. *London Imp. Cab. Co.,* L. R. 23 Q. B. D. 281.

The legislatures of the several States have power to impose liability upon owners of automobiles for injuries caused by the negligence of a third person, operating the same with the owner's consent; and in a few jurisdictions this liability has been indirectly imposed by giving to a person injured a lien upon the automobile for his damages.

FREEDOM OF THE CITY.

LAST month (October 15) the freedom of the city of New York was presented to Dr. Cook, the explorer, by the board of aldermen of the city. It is probable that few of our readers have ever seen a "freedom of the city," so called. That graceful token of the gratitude of citizens was given by the Common Council of New York to Andrew Hamilton, Esq., of Philadelphia, in 1735, and at the conclusion of this article we set forth a copy thereof with the proceedings connected with its presentation as they appeared in a pamphlet published by John Peter Zenger and reprinted in 17 Howell's State Trials 675, 723.

John Peter Zenger was born in Germany, came to New York about 1700, and there entered the printing business. In 1733 he began to publish the *New York Weekly Journal,* which he made the organ of the popular party in the colony. So much did the government feel his attacks that it was resolved in council that certain numbers of his papers and two ballads should be burnt by the hangman, while he was arrested on a charge of libel and was imprisoned for about eight months. His friends employed to defend him Andrew Hamilton, an eminent barrister from Philadelphia. In the trial the defense admitted the fact of publication, but maintained that since the statements were true there was no libel. Chief Justice De Lancey, who presided, contended, however, that "you cannot be permitted to give the truth of a libel in evidence." Hamilton, on the other hand, asserted that the jury had the right to determine both the law and the fact. The result was that the jury, imbued with popular opinion on the matter, gave a verdict of not guilty, which was greeted with huzzas in the crowded court room. This triumph of freedom of the press has been termed "the morning star of that liberty which subsequently revolutionized America."

Andrew Hamilton was born in Scotland, in 1676. Of his early history nothing is known, and the New International Encyclopædia says it is not certain that Hamilton was his real name, as he was for some time called Trent. About 1697 he came to Virginia, and afterwards removed to Philadelphia, when he was made attorney-general (1717) and a member of the Provincial Council (1721). He was prothonotary of the Supreme Court and recorder of Philadelphia, a member of assembly (1727) and its speaker in 1729. He and his son-in-law built as a private property the State House, which later became Independence Hall. For the verdict of acquittal which he obtained for Zenger, Gouverneur Morris styled him "the dogstar of the American Revolution." He was trustee of the General Loan Office and (1737) judge of the Vice-Admiralty Court of the Province of Pennsylvania.

The following is taken from the reprint of John Peter Zenger's pamphlet:

City of New York, ss.

At a Common Council held at the City Hall of the said city on Tuesday the 16th day of September, A. D. 1735: Present, Paul Richards, Esq., Mayor; Gerardus Stuyvesant, Esq., Deputy Mayor; Daniel Horsemanden, Esq., Recorder; Aldermen William Roome, Esq., Simon Johnson, Esq., John Walter, Esq., Christopher Fell, Esq., Stephen Bayard, Esq., Johannes Burger, Esq.; Assistants Mr. Johannes Waldron, Mr. Ede Myer, Mr. John Moore, Mr. John Fred, Mr. Charles Le Roux, Mr. Evert Byvank:

Ordered, That Andrew Hamilton, Esq., of Philadelphia, barrister at law, be presented with the Freedom of this Corpora-

tion, and that Alderman Bayard, Alderman Johnson, and Alderman Fell be a committee to bring in a draft thereof.

City of New York, ss.

At a Common Council held at the City Hall of the said city on Monday the 29th day of September, being the feast day of St. Michael the Archangel, A. D. 1735: Present, Paul Richards, Esq., Mayor; Daniel Horsemanden, Esq., Recorder; Aldermen William Roome, Esq., Simon Johnson, Esq., John Walter, Esq., Christopher Fell, Esq., Stephen Bayard, Esq., Johannes Burger, Esq.; Assistants Mr. Johannes Waldron, Mr. John Fred, Mr. Charles Le Roux, Mr. Evert Byvank, Mr. Henry Bogert:

Stephen Bayard, Simon Johnson, and Christopher Fell, Esqrs., aldermen, to whom it was referred to prepare the draft of the Freedom of this Corporation, to be presented to Andrew Hamilton, Esq., make the report thereon in the words following, to wit:

That they have prepared the form of the grant to the said Andrew Hamilton, Esq., of the Freedom of the City of New York, in these words, to wit:

"City of New York, ss.

"Paul Richards, Esq., the Recorder, Aldermen, and Assistants of the city of New York, convened in Common Council, to all to whom these presents shall come, greeting. Whereas honor is the just reward of virtue, and public benefits demand a public acknowledgment: We therefore, under a grateful sense of the remarkable service done to the inhabitants of this city and colony by Andrew Hamilton, Esq., of Pennsylvania, barrister at law, by his learned and generous defense of the rights of mankind, and the liberty of the press, in the case of John Peter Zenger, lately tried on an information exhibited in the Supreme Court of this colony, do by these presents bear to the said Andrew Hamilton, Esq., the public thanks of the Freedom of this Corporation for that signal service, which he cheerfully undertook under great indisposition of body, and generously performed, refusing any fee or reward; and in testimony of our great esteem for his person, and sense of his merit, do hereby present him with the Freedom of this Corporation. These are therefore to certify and declare that the said Andrew Hamilton, Esq., is hereby admitted, received, and allowed a freeman and citizen of the said city; to have, hold, enjoy, and partake of all the benefits, liberties, privileges, freedoms, and immunities whatsoever, granted or belonging to a freeman and citizen of the same city. In testimony whereof, the Common Council of the said city, in Common Council assembled, have caused the seal of the said city to be hereunto affixed, this 29th day of September, A. D. 1735.

"By order of the Common Council.

WILLIAM SHARPAS, *Clerk.*"

And we do further report, that sundry of the members of this corporation, and gentlemen of this city, have voluntarily contributed sufficient for a gold box of five ounces and a half, for inclosing the seal of the said freedom; upon the lid of which, we are of opinion, should be engraved the arms of the city of New York. Witness our hands this 29th day of September, 1735.

STEPHEN BAYARD,
SIMON JOHNSON,
CHRISTOPHER FELL.

Which report is approved by this court; and *Ordered,* That the freedom and box be forthwith made, pursuant to the said report; and that Mr. Sharpas, the common clerk of this city, do affix the seal of the same freedom, and inclose it in the said box.

Mr. Alderman Bayard going to Philadelphia, and offering to be the bearer of the said freedom to Mr. Hamilton; *Ordered,* That Mr. Sharpas deliver it to Alderman Bayard for that purpose, and that Alderman Bayard do deliver it to Mr. Hamilton, with assurances of the great esteem that this corporation have for his person and merit.

City of New York, ss.

At a Common Council held at the City Hall of the said city on Wednesday the 15th day of October, A. D. 1735: Present, Paul Richards, Esq., Mayor; Daniel Horsemanden, Esq., Recorder; Aldermen John Walter, Esq., Simon Johnson, Esq., William Roome, Esq., Johannes Burger, Esq.; Assistants Mr. Johannes Waldron, Mr. Abraham De Peyster, Mr. Gerardus Beekman, Mr. Peter Stoutenburgh, Mr. Henry Bogert:

Ordered, That the freedom granted by this corporation to Andrew Hamilton, Esq., with the report of the committee for preparing a draft of the same, and the order of this court thereon, may be printed. WM. SHARPAS.

Round on the lid of the box mentioned in the above-said report and order, there are engraved not only the arms of the city of New York, but also this motto in a garter: *Demersæ Leges — timefacta Libertas — hæc tandem emergunt.*

On the inner side of the lid of the box, showing itself at the same time with the certificate of the freedom, there are engraven, in a flying garter, these words: *Non nummis, Virtute paratur.*

As an incentive to public virtue, on the front of the rim of the said box there is engraven a part of Tully's wish: *Ita cuique eveniat, ut de republica meruit.*

Which freedom and box were presented in the manner that had been directed. and gratefully accepted by the said Andrew Hamilton, Esq.

Cases of Interest.

LIABILITY OF MERCANTILE FIRM FOR INJURY TO CUSTOMER PUSHED BY CROWD AT BARGAIN COUNTER. — In F. W. Woolworth & Co. *v.* Conboy, 170 Fed. Rep. 934, the Circuit Court of Appeals of the Eighth Circuit holds that a mercantile firm is not liable for an injury to a customer who is pushed down an ordinary flight of stairs by a violent crowd at the bargain counter, the firm having no reason to believe that the sale being conducted would lead to any uncontrolled or violent conduct on the part of its customers.

INDUCING PERSON BY THREATS OF PROSECUTION TO LABOR IN PAYMENT OF DEBTS AS PEONAGE. — United States *v.* Clement, 171 Fed. Rep. 974, was a prosecution in a federal District Court of South Carolina for violation of the United States "peonage" statute. The government's case was that the defendant, by threatening named persons with prosecutions under the State labor contract law or prosecutions for other offenses, induced such persons to remain in his service against their will in order that he might secure by their labor the payment of their indebtedness to him. Judge Brawley charged the jury, in effect, that "peonage" within the meaning of the statute is the holding of persons in unwilling servitude in payment of debts, by means of either force or intimidation, and that inducing a person to labor in payment of debts by threats of prosecution may amount to peonage, if by reason of the different character of the parties the servant's will is overcome by such threats and the service rendered is involuntary.

RIGHT TO RECOVER SALE PRICE OF VOLTAIRE'S WORKS. — In St. Hubert Guild *v.* Quinn, 118 N. Y. Supp. 582, the New York

Supreme Court, Appellate Term, holds that a recovery may be had of an amount due under a contract by which the plaintiff sold and delivered to the defendant forty-two volumes of the works of Voltaire. The defense was that the books contained "reading of a licentious, lascivious, and lewd character and not fit to be used or read in the defendant's family," and that therefore the contract of sale was illegal. Rejecting the contention, the court observed: "The same criticism has been directed against many of the classics of antiquity and against the works of some of our greatest writers from Chaucer to Walt Whitman, without being regarded as sufficient to invalidate contracts for the sale or publication of their works. . . . The rule against the sale of immoral publications cannot be invoked against those works which have been generally recognized as literary classics."

STATUTE PROHIBITING DISCUSSION OF JUDICIAL CANDIDATES AS VIOLATION OF RIGHT OF FREE SPEECH. — In State *v.* Junkin, 122 N. W. Rep. 473, the Nebraska Supreme Court holds that the statute of that State providing that candidates for judicial and educational offices shall not be "nominated, indorsed, recommended, censured, criticised, or referred to in any manner by any political party, or by any political convention or primary, or at any primary election" is a violation of the declaration of the Bill of Rights that "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense;" and also of another declaration of the Bill of Rights that "The right of the people, peaceably, to assemble to consult for the common good, and to petition the government or any department thereof, shall never be abridged." Dean, J., dissents.

POWER OF INTERSTATE COMMERCE COMMISSION TO FIX RATES TO COUNTERACT TRADE ADVANTAGES OF CERTAIN CITIES. — In Chicago, etc., R. Co. *v.* Interstate Commerce Commission, 171 Fed. Rep. 680, the United States Circuit Court of the Northern District of Illinois holds that the Interstate Commerce Commission has no power, under the Interstate Commerce Act, to lower through rates between certain points, as between Atlantic seaboard points and points on the Missouri river, and between points on the Mississippi river and the city of Denver, without changing the rates to intermediate points, the sole purpose of the reduction of rates being to create arbitrarily zones of trade tributary to given trade and manufacturing centres and counteract the commercial advantages possessed by certain cities by reason of their geographical position or otherwise. "Such a power," said Judge Grosscup, "vaster than any that any one body of men has heretofore exercised, though wisely exerted in specific instances, would be putting in the hands of the Commission the general power of life and death over every trade and manufacturing centre in the United States." Baker, Circuit Judge, dissents.

EXPULSION OF SCHOOL CHILDREN FOR REFUSAL TO TAKE SINGING LESSONS. — In School Board District No. 18 *v.* Thompson, 103 Pac. Rep. 578, heard in the Supreme Court of Oklahoma, the parents of certain school children brought an action in mandamus to compel the school authorities of the city of Pauls Valley, Garvin county, to reinstate their children in the public schools, from which they had been expelled for the reason that, under the direction of their parents, they refused to take singing lessons which were a part of the prescribed course of study in said schools. The judgment for the plaintiffs in the District Court was affirmed, it being held that while the school authorities may prescribe the courses of study, make reasonable rules and regulations, and require prompt attendance, respectful deportment, and diligence in study, the parent nevertheless has a right to make a reasonable selection from the prescribed course of study for his child to pursue, which selection must be respected by the school authorities, the right of the parent in that regard being superior to that of the school officers and teachers.

LIABILITY OF OWNER OF STOREHOUSE FOR SHOOTING WOULD-BE BURGLAR WITH SPRING GUN. — It is well settled that one who sets a spring gun on his premises must see to it that persons lawfully upon the premises, and even mere trespassers, are not injured by such gun. The novel question of the liability of the owner of premises to a person who, in the act of committing a forcible felony on the premises, is shot by a spring gun set by the owner, was before the Alabama Supreme Court in Scheuermann *v.* Scharfenberg, 50 So. Rep. 335. It appeared that the owner of a storehouse in which goods and other valuables were kept by him for sale and in deposit placed in the store a spring gun for the purpose of shooting persons who might attempt to burglarize the building. A burglar came, and while attempting to enter the store and after the breaking was completed, discharged the gun and was shot. The court held that the owner was not liable. Burglary of such a storehouse, under the Alabama statute, is a felony punishable as if the building were a dwelling, and the court, in the absence of any direct precedent, applied the common-law principle that it is the right of a person to defend his property as well as his person against a violent and forcible felony such as burglary.

VALIDITY OF STATUTE PROHIBITING SALE OF NON-INTOXICATING MALT BEVERAGES. — In Elder *v.* State, 50 So. Rep. 370, the Alabama Supreme Court passed upon the constitutionality of the statute of that State making it unlawful to sell or otherwise dispose of "hop-jack, hop-tea, hop-weiss, hop-ale, malt tonic, or any other beverage which is the product of maltose or gencose, or in which maltose or gencose is a substantial ingredient," in territory where the sale of intoxicating liquors is prohibited. The statute was assailed on the ground, among others, that the legislation was not within the police power of the State and was an unwarranted invasion of the rights of the citizen. It was not pretended that the drinks specified by the statute were calculated to produce intoxication, or would have any influence on the public morals, except so far as they might be used as a means for evading the prohibition laws. On the first hearing four of the justices were of the opinion that the statute was within the police power, three of the justices dissenting on the ground that the legislature had no power to prohibit the sale of harmless beverages simply for the reason that they might resemble intoxicating drinks which could be sold in the name of the non-intoxicating drinks. On the rehearing one of the justices who had concurred in the conclusion of the majority took the view that the substance of the act was not included in the title, and the act was accordingly declared invalid.

INJUNCTION AGAINST REMOVAL TO PEST HOUSE OF PERSON AFFLICTED WITH ANÆSTHETIC LEPROSY. — In Kirk *v.* Wyman, 65 S. E. Rep. 387, the South Carolina Supreme Court affirms a decree granting a temporary injunction restraining a municipal board of health from removing the complainant to the city pest house. The complainant, who was a lady of culture and refinement, had become afflicted with anæsthetic leprosy while a missionary in a foreign country, but had for many years since her return lived in the city in question, attended church services, taught in Sunday school and mingled freely with the people in their social life, relying on the opinion of a distinguished specialist that her disease was not contagious; and it appeared as a fact that in all this time she had not, so far as was known, imparted the disease to any other person, and that there was little, if any, danger of contagion except from touch or close personal association. Eventually, however, the board of health established a strict quarantine of her dwelling and took steps to send her to the pest house. The

pest house, used theretofore for the isolation of negroes with smallpox, was shown to be uncomfortable and in an undesirable location near the city's dumping grounds, and the board had agreed to build a comfortable cottage outside the city limits, for the complainant's isolation, which could be completed in a few months. It was held that the complainant's condition did not justify her removal to the pest house. Hydrich, J., dissents.

VALIDITY OF STATUTE PROHIBITING RE-USE OF TRADEMARKED ORIGINAL PACKAGES. — In People *v.* Luhrs, 89 N. E. Rep. 171, the New York Court of Appeals holds that the statute of that State declaring any one guilty of a misdemeanor "who knowingly sells, offers, or exposes for sale, any goods which are represented in any manner, by word or deed, to be the manufacture or product of any person, firm, or corporation, other than himself, unless such goods are contained in the original packages and under the labels, marks, or names placed thereon by the manufacturer who is entitled to use such marks, names, brands, or trademarks," is not unconstitutional as a taking of property without due process of law. The defendant, who was a barkeeper, had been convicted under the statute on evidence that he had refilled a bottle bearing the trademark of the Wilson Distilling Company. He contended that in purchasing Wilson whiskey in Wilson bottles he became the owner of the bottles as well as the contents; that in case of accident he might preserve what was left in one bottle by pouring it into some receptacle and thence, as he had occasion, into another Wilson bottle which had contained Wilson whiskey; that he might exhibit this bottle to induce a sale, and that if the statute prohibited such act it deprived him of property without due process of law. The Court of Appeals in affirming the conviction holds that the purchaser of a bottle with the trademark thereon does not acquire the right to use the trademark except to sell the original contents of the bottle, and that the statute is a reasonable regulation governing the use of property offered for sale so as to prevent fraud.

LIABILITY OF PROMOTERS OF CORPORATION FOR PROFITS OF SECRET SALE MADE TO CORPORATION. — In Old Dominion Copper Mining & Smelting Co. *v.* Bigelow, 89 N. W. Rep. 193, the Massachusetts Supreme Judicial Court had before it a suit by the plaintiff corporation to recover secret profits made by the defendant as one of the promoters of the corporation, in selling to the corporation, while it was under the absolute control of himself and his associate, certain mining properties belonging to himself and such associate. The promoters planned to capitalize the corporation at $3,750,000, and to sell to the corporation their mining property, costing and intrinsically worth $1,000,000 and having a market value of not over $2,000,000, for $3,250,000, and to sell to the public at par for cash the remaining $500,000 of the stock to procure a working capital, without disclosing the substance of the sale which had been made to the corporation or the profits realized. This sale to the corporation was carried out and ratified at a time when they held all the stock which had been issued, but no independent advisers or officers were provided for the corporation to pass upon the wisdom of the purchase. Afterwards practically all of the remaining stock was sold to the public. It was held that inasmuch as the promoters stood in a fiduciary relation to the corporation, the sale to the corporation was a breach of trust, and a wrong which affected all stockholders, present and future, rendering the promoters liable to the corporation for the secret profits made in the transaction. It was held that the rule which exempts the promoter of a corporation from liability to the corporation for a sale without disclosure when he takes the entire issue of capital stock cannot be extended to a case where the scheme of promotion contemplates a sale at par to the public of a substantial part of the stock of the corporation after the promoter has sold property to the corporation at a secret profit. Chief Justice Knowlton and Justice Morton dissent on the ground that the corporation had been completely organized with the right to do business, and that the validity of the sale by the promoters to the corporation could not be affected by the fact that the stock was not all issued and that a part was retained to be issued to obtain working capital or for other purposes.

New Books.

SOME "MOTHER'S DARLING" ORATORY.

Classics of the Bar. Stories of the World's Great Jury Trials and a Compilation of Forensic Masterpieces. By Alvin V. Sellers. Crown 8vo, pp. 314. Baxley, Ga.: Classic Publishing Co., 1909. $3.00 ("special introductory price," $2.00).

In this volume, which is described by its publishers as "an intellectual mint julep," we find in its purest strain what James W. Osborne of New York once termed "vegetable oratory — the fruits and flowers of eloquence."

We hear a good deal nowadays about the passing of the old-time jury lawyer — him of the waving arms and sonorous voice in whose forensic efforts logic was subordinated to sound. That the type has not entirely passed and is firm in the affections of at least a few members of the bar is demonstrated by this book. Witness the dedication, which is: "To those members of the bar who have felt in their hearts the thrill and the joy of lifting from a prison cell to loving arms some mother's darling." Witness also the following extract from the compiler's preface, which he denominates a "foreword:"

"The Temple of Justice is a temple of tragedy. It is a temple where happiness often yields to despair and smiles of joy are changed to tears of grief. We see there every phase of human society, every attribute of human life, every form of human character. There are bosoms where gleam fierce flames of vice and crime, and bosoms fragrant with violet vales of truth where the Goddess Virtue sits enthroned. We see eyes wet with tears of penitence, hear piteous sobs of regret and words of pardon soft and sweet. We hear savage cries for vengeance there, and see wrapped with precious robes of purity hearts that lovingly forgive. There lurk the demons of revenge with dripping sword in hand, while hovering near may be ever seen divine angels of mercy and justice. Beyond the gathering clouds of gloom is seen the trembling star of hope. There are hearts upon which fall the shadows of night, and hearts crowned with the splendors of imperial day. We see dreadful pictures drawn and painted upon scarlet brows of shame, and we see the throne of honor there and the scepter held by lofty manhood's king."

There is more, but this will suffice. Before the bosoms fragrant with violet vales and the bosoms on which fierce flames gleam, all confined with the divine angels, demons, dripping swords, and other things in this remarkable temple, we must needs pause.

The foregoing excerpts indicate partially the author's taste in selecting the examples of oratory which form the body of the book. There is much that is perfervid and pyrotechnic, as for instance Henry L. Clinton's argument in the trial of Dr. Brown and Delphin M. Delmas's address to the jury in the first Thaw trial. The latter peroration occupies thirty-six pages of the volume which might have been better used.

Not all of the book, however, is of this description, we are glad to say. There is much that is really fine and eminently worthy of preservation. Among the best things in the volume

from the standpoint of oratory are Sergeant S. Prentiss's speech in behalf of his friend Judge Edward C. Wilkinson, and Senator Daniel W. Voorhees's address on the trial of Crawford Black.

The rest of the book is of sufficiently varied character to contain something for practically all tastes. There are, substantially in full, the arguments of Mr. Tracy and Mr. Beach in the Tilton-Beecher trial; of Mr. Darrow and Senator Borah in the Haywood trial at Boise, Idaho; of Messrs. Peixotto and Barnes in the Durrant murder case at San Francisco; of S. H. Hammond in the trial of Reuben Dunbar; and of Susan B. Anthony in answer to the question why sentence should not be pronounced on her conviction for illegal voting. Besides these there are parts of perorations of James T. Brady, W. W. Irwin, Charles Russell (in defense of Patrick O'Donnell), Henry L. Clinton (in the trial of Richard Croker for murder and in other cases), R. T. Merrick (in the Surratt trial for the murder of Lincoln), W. H. Seward, Isidor Rayner, Robert G. Ingersoll, Henry W. Scott, and James Hamilton Lewis.

There is certainly two dollars' worth in the book, in whatever aspect it is viewed.

News of the Profession.

COOKE ELECTED TO ILLINOIS SUPREME COURT. — George A. Cooke, of Aledo, Mercer county, was on September 25 elected a justice of the Supreme Court of Illinois to succeed the late Justice Guy C. Scott.

DEATH OF WELL-KNOWN LOUISVILLE ATTORNEY. — Joseph T. O'Neal, one of the best known and ablest members of the Louisville bar, died in that city on September 21, at the age of sixty-one.

VANCE JOINS YALE LAW SCHOOL FACULTY. — W. R. Vance, dean of the George Washington University Law School, has retired from that post and accepted a professorship in the Yale Law School.

DEATH OF EMINENT TEXAN. — Judge Eugene Williams, formerly a district judge in Texas and for many years a leading member of the Waco bar, died in that city on September 21, aged fifty-four.

CALIFORNIA JUDGE DIES. — Hon. Warren Sexton, judge of the Superior Court of Butte county, Cal., and one of the best known men in the State, died at Oroville, Cal., on September 13, at the age of forty-nine.

APPOINTED TO SUPREME BENCH OF BALTIMORE. — Mr. Martin Lehmayer has been appointed by Governor Crothers, of Maryland, to fill the vacancy on the Supreme Court bench of Baltimore created by the death of Judge Conway W. Sams.

KILLED BY A CLIENT. — J. T. Patterson, a prominent attorney of Wynne, Ark., was shot and killed on October 11, by Henry Harding, a client with whom Mr. Patterson had had a dispute concerning the amount of his fee.

APPOINTED TO PENNSYLVANIA JUDGESHIP. — On September 16 Governor Stuart appointed Alonzo T. Searle, of Honesdale, Pa., to be president judge of the Twenty-second Judicial District of Pennsylvania in place of Judge George S. Purdy, deceased.

CANADIAN LAWYER DROPS DEAD IN MONTREAL. — Hon. J. J. Curran, formerly a justice of the Supreme Court of Quebec, and Solicitor-General of Canada under Sir John Thompson and Sir Mackenzie Borwell, dropped dead on the street in Montreal on October 1.

GAYNOR RESIGNS FROM NEW YORK SUPREME COURT. — Justice William J. Gaynor, of the New York Supreme Court, who is the Democratic nominee for mayor of New York city, on October 14 sent to Governor Hughes his resignation from his judicial office.

NEW YORK SUPREME COURT JUDGE TO RETIRE. — Justice Henry A. Gildersleeve, of the New York Supreme Court, First Department, has announced his intention to retire on December 1, and join the New York City law firm of O'Brien, Platt, Boardman & Littleton.

MADE DEPUTY ASSISTANT ATTORNEY-GENERAL. — D. Frank Lloyd, of New York, has been appointed by President Taft deputy assistant attorney-general of the United States. The appointment was under the provision of the new tariff law creating a court of customs appeals.

PROMINENT VIRGINIAN PASSES AWAY. — Judge James Asa Dupuy, a distinguished member of the Roanoke, Va., bar, died in that city on October 2, aged fifty-five. Formerly he was circuit judge of the circuit in which Roanoke is situated. Judge Dupuy was a graduate of the University of Virginia law school.

VERMONT BAR MEETING POSTPONED. — The annual meeting of the Vermont State Bar Association which was to have been held on October 5 has been postponed until November 2, on which day the November term of the State Supreme Court will also open. The meeting is to be held in Montpelier.

RUSSIA'S FIRST WOMAN LAWYER. — Dr. Katherine Fleischer has recently been admitted to the bar in Russia and will practice her profession in St. Petersburg. She is the first woman lawyer in the Czar's domain, and has achieved the honor only after an uphill fight against strong opposition, much of which came from her own sex.

DISTINGUISHED NEW YORKER DEAD. — Edward Flint Brown, for many years a prominent member of the New York City bar, died at his home in that city on September 26 at the age of seventy. He was a graduate of Yale and of the Columbia Law School. Mr. Brown nominated Theodore Roosevelt for his first candidacy for the Assembly.

DEATH OF SIR HENRI TASCHEREAU. — Sir Henri Taschereau, chief justice of the Court of King's Bench of the Province of Montreal and one of the consulting editors of the American and English Encyclopædia of Law and Practice, died suddenly on October 11, at the home of his daughter, near Paris, France. He was sixty-eight years old. Mention of his career will be made in these columns later.

JOHN P. POE DIES. — John P. Poe, formerly attorney-general of Maryland, leader of the Maryland bar, and one of the most prominent citizens of the State, died on October 14 of paralysis at the age of seventy-three. Mr. Poe had been dean of the law department of Maryland University since 1871. He was the father of the noted Princeton athletes.

NOVA SCOTIA'S ATTORNEY-GENERAL DEAD. — W. T. Pipes, attorney-general of Nova Scotia, died suddenly on October 7, at Cambridge, Mass., where he was visiting friends. He was a member of the legislature of that province and a member of Premier G. H. Murray's cabinet. He was formerly commissioner of public works and mines, and was prominent in the Liberal party of Nova Scotia.

EVANS PROMOTED TO ALABAMA SUPREME COURT. — Hon. Nimrod D. Denson, associate justice of the Alabama Supreme Court for the last five years, has resigned his seat on the bench and resumed private practice in his home town, Lafayette. On September 28 Governor Comer appointed Judge A. A. Evans, of Clayton, to fill the vacancy until the next general election. Mike Sollie, of Ozark, was appointed to succeed Judge Evans on the circuit bench.

MASSACHUSETTS JUDGE DEAD. — Hon. Robert R. Bishop, associate justice of the Superior Court of Massachusetts, died in Newton, Mass., on October 7, at the age of seventy-five. Judge Bishop had served on the Superior Court bench since 1888. In 1882 he was the candidate of the Republican party for governor but was defeated in a memorable campaign by Benjamin F. Butler. Previous to that time he had served several terms in the State senate. He was a graduate of the Harvard law school.

DEATH OF EDMOND KELLY. — Edmond Kelly, a lawyer distinguished equally in New York and Paris, and a writer of considerable note, died at his home near Nyack, N. Y., on October 4, aged fifty-eight. Mr. Kelly was educated at Cambridge, England, and Columbia College, taking his law course in the Columbia law school. After his admission to the bar he practiced in New York city for a number of years, but in 1900 removed to Paris. There he was engaged in many noted law suits, among them the de Castellane divorce case and the Fair will case.

MORTON SUCCEEDS JUDGE GASKILL. — The vacancy in the branch of the Massachusetts Superior Court created by the death of Judge Francis A. Gaskill has been filled by Governor Draper by the appointment of Marcus Morton, of Newtonville. Judge Morton, who is forty-seven years old, is a graduate of Yale and of the Harvard Law School. He comes of a family intimately identified with the judiciary of Massachusetts, for his grandfather, besides serving as governor of the State, was a justice of the supreme court and his father was chief justice of the court.

TO LECTURE ON ADMIRALTY IN MAINE UNIVERSITY. — Hon. Edward H. Blake has accepted the position of lecturer on admiralty in the University of Maine College of Law. His acceptance is a source of high gratification to the president of the university, to the faculty of the law school, and especially to the advisory board of the College of Law, whose president is Gen. Charles Hamlin, and whose other members are Governor Cleaves, of Portland; Chief Justice L. A. Emery, of Ellsworth; Justice A. M. Spear, of Gardiner; Hon. Wm. T. Haines, of Waterville; Hon. H. M. Heath, of Augusta; and Prof. W. E. Walz, the dean of the law school and secretary of the board.

FEDERAL SUPREME COURT OPENS. — The fall term of the United States Supreme Court began on October 11 with but seven justices on the bench, Justices Moody and Peckham being absent on account of illness. Owing to the absence of President Taft the customary call at the White House was omitted, and the court, instead of adjourning at once, proceeded to business. Among the important matters on the docket are the suit against the American Tobacco Company under the Sherman Law, the proceedings for the preservation of the Saratoga springs, and the suit by the government to prevent the construction of the great sewer from Yonkers, N. Y., to the Hudson river.

MARITIME CONFERENCE AT BRUSSELS. — On September 28 the International Congress of Maritime Law opened at Brussels with M. Beernart, former Belgian minister of state, presiding. The questions submitted to the conference include new rules relating to collisions and assistance to distressed vessels, and regulations dealing with the privileges and liabilities of shipowners. The majority of the twenty-five countries represented have already signified their willingness to accept the propositions formulated. The United States is represented in the Congress by Edwin W. Smith, of Pittsburg; United States Circuit Judge Walter C. Noyes, of New London, Conn.; A. J. Montague, ex-governor of Virginia; and Charles C. Burlingham, of New York city.

MISSOURI STATE BAR ASSOCIATION. — The twenty-seventh annual meeting of the Missouri State Bar Association was held at Pertle Springs, near Warrensburg, on September 18 and 19. The annual address of the president, F. N. Judson, was an elaborate review of the legislation of Missouri and other States, together with a comprehensive discussion of the present movement for a reformed procedure. Interesting papers were read on Industrial Insurance, by J. M. Atkinson, assistant attorney-general of Missouri, and on Employers' Liability, by Tyson S. Dines, of St. Louis, Mo. M. B. Rhodes, of Potosi, Mo., chairman of the house committee on revision, in the last general assembly, delivered an address on the manner in which the work of the revision committee had been done during the general assembly. Then R. F. Walker and Homer Hall explained the manner in which the revision commission of 1909 was publishing the statutes. The feature of the occasion was the annual address delivered by Mr. Justice Riddell, of the Court of King's Bench, Toronto, Canada, the subject being "The Judicial Committee of the Imperial Privy Council." There was also an address upon the new Code of Civil Procedure in the State of Kansas, by Judge Stephen H. Allen, of Topeka, Kan. The annual banquet was addressed by Judge Philips, Mr. Justice Riddell, Judge Allen, and F. W. Lehmann, of St. Louis, Mo. An important feature of the meeting was the adoption of the following resolution: "That the incoming committee on constitutional and statutory amendments be directed to formulate and present a scheme for the unification and simplification of the judicial system of the State of Missouri, whereby a system of judicature will be created adequate to promptly dispose of all the judicial business in the State of Missouri." The plan is to be reported to the 1910 convention, and the committee provided for has not yet been named. The following officers were elected: President, J. W. Halliburton, of Carthage; secretary, Lee Montgomery, of Sedalia; treasurer, R. E. Ball, of Kansas City.

English Notes.

END OF LONG VACATION. — On October 12 the Long Vacation, which began on August 12, came to an end, and the courts were opened for business.

DEATH OF AN IRISH LORD JUSTICE. — The Right Hon. Gerald Fitzgibbon, Lord Justice of Appeal in Ireland, died in Dublin on October 8, at the age of seventy-two. He became law adviser to Dublin Castle in 1876, was made solicitor-general of Ireland in 1877, and since 1878 had held the position of Lord Justice of Appeal.

ANNUAL MEETING OF LAW SOCIETY. — The thirty-fourth annual provincial meeting of the Law Society, the official organization of the solicitors, was held at Newcastle on September 28. The president, Mr. W. H. Winterbotham, made the opening address, in which, among other things, he advocated the establishment of a law school. They have been thinking that scheme over for a good long time in England, and perhaps they really will start such a school some of these days. There were a number of other addresses, mostly on topics of purely local interest.

MARRIAGE PUNISHED BY IMPRISONMENT. — Usually the courts have been content to let marriages be their own punishment, but in the recent case of *In re* H.'s Settlement, (1909) 2 Ch. 260, Mr. Justice Warrington sent a boy of seventeen, a ward in chancery, to prison for getting married without the consent of the court. There have been instances of imprisonment for contempt of persons who have married wards of court, but this

is said to be the first case in which the ward himself (usually it has been a herself, however) has been thus punished. After keeping the young husband in custody for eleven days the court allowed him to proceed with his honeymooning.

IMPRISONMENT FOR DEBT. — Alluding to the fact that Dr. Samuel Johnson was once imprisoned for debt, a correspondent of one of the London newspapers remarks that the worthy doctor was lucky in that he lived at a time when imprisoned debtors were treated with more consideration than they are at present. The old Marshalsea and Fleet prisons, familiar to readers of Dickens, were not all that could be desired, but they were better than the accommodations now afforded to debtors. Moreover, in those prisons a debtor was allowed a certain amount of liberty, and, if he had any money, could get what he required, while the imprisoned debtor of to-day is treated much as an ordinary criminal. He is confined in a cell which he has to clean out; he has to make shift with the meagre prison fare; and he must do some oakum picking or other degrading drudgery. Indeed, strange to say, instead of being relaxed, the conditions under which imprisoned debtors exist have, in recent years, become more stringent. A return to the methods of Dr. Johnson's time would be a marked improvement on the present system.

FORCING FOOD ON FEMALE FURIES. — Some of the suffragettes who have been imprisoned for raising hob because they wanted to vote and couldn't have been leading the prison officials a hard life by refusing to eat. This reprehensible conduct on the part of the ladies left but three courses open to the jailers: to turn the prisoners loose; to let them starve; or to introduce food into their rebellious systems by main strength. The first was clearly out of the question, for it would open the doors to every prisoner who had sufficient control over his appetite to fast. As to the second, it would be in violation of the jailer's duty to prevent his guests from committing suicide and to keep them alive, if possible. Consequently the prison authorities, under instructions from the Home Office, adopted the third course, and there have been some pretty lively doings in the jails since then. It is reliably reported that in comparison with the compulsory feeding of a single suffragette, the simultaneous slaughtering of six large, healthy hogs would sound like somebody sitting up with a corpse. And now the ladies are getting ready to bite the hands that fed them by bringing actions for damages against the jailers. Altogether the suffragette movement must be a bit unpopular with the jailers.

THE SOVEREIGNTY OF THE POLE. — In a recent number the *Law Journal* says editorially: "At last the North Pole — the goal of so much heroic effort — seems to have been achieved. To-day it is the scientists who are busy; to-morrow the lawyers will begin, for law follows the explorer like his shadow into each new region which he occupies, and dispenses its rights, its duties, and its privileges. Time was when the discovery of the North Pole was expected to open a new commercial route to the East. That was what Parry, Ross, and Franklin looked for in their search for the 'Northwest Passage.' Any dream of that kind has long since faded, and to-day the finding of the Pole has become chiefly a matter of international emulation, of scientific and geographical interest. The territorial sovereignty, for whatever it is worth, belongs presumably in this case to the United States. The claim suggested for Denmark on the ground that the Pole is part of Greenland can hardly be maintained, since Peary has proved Greenland to be an island. Any pretensions by the British Crown in right of Canada, as to which Sir Gilbert Parker questioned the Prime Minister, are as unsubstantial. They would belong, if set up, to the same category of claims as that of the Spaniards to engross the whole of America south of the Gulf of Mexico, or that of the King of France to monopolize the valleys of the Ohio and the Mississippi. But there is what lawyers would call a preliminary objection, which goes to the root of the matter. Can there be any question of territorial sovereignty if the only territory is an open polar sea? Cook sunk his cylinder with the Stars and Stripes in it on an ice floe, and Peary seems to have planted his flag on the same precarious and shifting foundation; and the sea, it has long since been settled, cannot become the exclusive property of any nation. But if as a technical matter of international law the United States cannot claim the sovereignty of the Pole, that disability cannot derogate from the honor which belongs, and must always belong, to them of achieving the conquest of this long-coveted crown of the earth."

Obiter Dicta.

HIS REASON. — A former New York lawyer who recently committed suicide in Denver left the following note: "Oh, hell, I am a lemon."

NOT BY A LONG SIGHT. — "The father is *prima facie* qualified to pass an opinion upon the elocutionary ability of his own daughter." Montgomery, J., in Cleveland, etc., St. R. Co. v. Hadley, (Ind.) 82 N. E. Rep. 1025.

A PROFESSIONAL CARD. — Among the local advertisements which adorn the drop curtain of a variety theatre in Greensboro, N. C., is the following: "If you want peace, see D. H. Collins, Justice of the Peace."

NO CANINE TELEPATHY. — In Commonwealth *v.* Marshall, 15 Gray (Mass.) 202, it was held that a dog's conduct "could not have been influenced or affected by any sayings or declarations made in his absence, of which he never heard."

LOVELY WOMAN'S FAVORITE EXCUSE. — In Brown *v.* State, 127 Wis. 193, the court remarked upon "the proneness of woman, when she finds the fact of her disgrace discovered or likely of discovery, to minimize her fault by asserting *vis major*." Perhaps the court meant to say *vir major*.

THE LIMIT IN TECHNICALITIES. — Out in Prosser, Wash., recently the attorney for a convicted defendant in a criminal case moved for a new trial on the ground that the presiding judge did not wear his judicial gown all the time the trial was in progress. He probably contended that the conduct of the judge surprised the defendant.

DIRECTING A VERDICT. — A lawyer in a West Texas county while defending a prisoner in a justice's court had occasion for some reason to step out of the court room. On returning he found the justice addressing the jury and caught the close of his remarks. "Gentlemen," his honor was saying, "it won't do to turn this man loose. He's guilty. I tell you he's guilty as hell."

EARNING THEIR PAY. — The good people of Arkansas have reason to feel proud of the diligent gentlemen who represented them in the last General Assembly. During the session commencing January 11, 1909, and ending May 12, 1909, that enterprising body enacted laws enough to fill a portly volume of 1240 pages, exclusive of the index and table of contents. Pretty good for four months — huh?

MOVING UP. — Declaring that he could not remain a lawyer and be a good man, Attorney Eli F. Cunningham, of Clayton, Mo., recently abandoned his practice and became a preacher. About the same time the Rev. D. H. Carrick, of Lawrence, Kan., reached the conclusion that "a man could not earn an honest living as a minister." Consequently he quit his job

and secured a position as a street car conductor. Who knows but that before long we shall hear of some street car conductor abandoning his vocation because of its temptations and rising to a still higher ethical level?

AS DIRECTED. — The following, which comes to us from an unknown source, may be an old one, but at any rate we never saw it before: "At a court of justice in Australia much frequented by Chinese a newly appointed crier was ordered by the judge to summon a witness to the stand. 'Call for Ah Song,' was the command. The crier was puzzled for a moment. He glanced shyly at the judge, but found him quite grave. Then he turned to the spectators. 'Gentlemen,' he asked, 'would any of you favor his lordship with a song?'"

A PLAUSIBLE DEFENSE. — Out in St. Joseph, Mo., recently an intoxicated gentleman was gathered in by the police and lodged for the night in the same cell with a notorious thief. The inebriate had some small change in his pockets, and this his acquisitive roommate promptly annexed. The transaction having been discovered and fastened upon the robber, he was arraigned on a charge of robbery from the person and argued his own case. His defense was that as he was a known thief and criminal, the city had, in putting in the same cell with him a drunken man who had money on his person, been guilty of contributory negligence and had thereby forfeited any right to recover against him. However, the point was too subtle for the presiding justice, and consequently did not receive the consideration to which it was entitled.

A LITERARY DUN. — A friend in New York city sends us the following choice bit of literature which was recently received by one of his clients from a Kansas City law firm relative to a small claim:

"DEAR SIR: Over two weeks ago we notified you of the above account, and have not heard a word from you — good, bad, or indifferent — since. It seems that you are bent upon treating us as you treated our client, the Publishers' Adjusting Association. It remains, however, to be seen, with how much success.

"You wilfully and persistently spurn with studied deaf-and-dumb muteness every civil request to make any provision for either present or future payment, or even part payment, of a debt that stands self-confessed to be both true and just by your own tongue-tied attitude.

"The truth is, secrecy and cunning seem to be your highly cherished characteristics. There is, however, one sure way to deal with a fox, and that is, to bring him into the open.

"So, unless a remittance is sent to our offices within fifteen days from the day on which you receive this letter, or at least some definite statement furnished for the disposal of said indebtedness, proceedings will be resorted to in a court whose jurisdiction can be relied upon to reach you effectively."

AN UNFORTUNATE OCCURRENCE. — A West Virginia law firm recently received the following letter:

Please give this your careful examination and and answer soon. June 4, 1909

You will find a stamp for a reply
Make of your bill for answer if any.
Honorable ———:

On Sept. 1 1907 Will Cole disputed a true statement I made Concerning another man and he took up a rock made A attempt to knock me in the head and another man interfeared and stoped him C. I. D. Cole was present and rather upheld his sun (I consider that to be rocky treatment) The racket was generally knowen to the church And on the 29 of Feb. 1908 Will Cole was elected as Sunday School Superintendant and I was elected as Sunday School Secutary. on the 3 of March Will Cole opened Sunday School. I wrote in the S. S. Minete Book. Sunday School opened by a Rockey Fellow. And in blanks for remarks the above racket as being the cause of me calling Will A Rockey Fellow the racket had not been settled yet when I wrote and on June 6. 1908 C. I. D. Cole brought and charged against me in the church as follows for defacing the Sunday School Minete Book and writing falsehoods in the book. I claimed the writing to be true and the charge false and demanded of Will Cole A statement. He acknowledged to all the above racket. Bros. C. I. D. Cole and and A. L. McClung quarled at me a little and prouced no evidence on the charges and stated charges proved and the next meeting the church turned me out. I claim that I disproved and demanded a rehearing before a commity The church refused Can I bring a slander suit against Coal and McClung or the church, or can I have Will Cole indicted yet.

A DIFFICULT SCHOLAR. — In State *v.* Hamilton, 42 Mo. App. 24, which was a mandamus proceeding to compel the reinstatement in school of an expelled pupil, it appeared that the pupil in question was in the habit of carrying brass knuckles, sleeping and talking aloud in school, scraping his feet on the floor, swearing, and getting up fights between the smaller boys. "The respondents further stated that said boy while attending said school was in the habit of smoking and chewing tobacco. He smoked around and about the schoolhouse during the intermission of the school, and chewed tobacco in the schoolhouse during school hours. He would, while chewing tobacco in the school, spit tobacco juice all over the floor, on the walls, on the windows, squirt it from his mouth on the stove, on the coal-scuttle, on the poker. This smoking, chewing, and spitting of tobacco juice, said boy continued all the time he was in attendance on said school, although often remonstrated with by the teacher, and was, by said teacher, frequently requested to stop chewing and spitting. That he paid no attention to said teacher's request, but insisted he had the right to use tobacco, and that in its use, both in and out of school, he had the consent and encouragement of his father. That said boy gave tobacco to other pupils and induced them to chew; and one evening while going home from school he smoked a pipe, puffing the smoke into the faces of other pupils, and, although reprimanded by the teacher, who happened to be present, he persisted in his course, and that on that occasion he was grossly rude, defiant, and insolent to the teacher. That subsequently at school said teacher told said boy that his conduct on the road on said evening was such that he would have to be whipped or expelled, to both of which said boy refused to submit, and refused to leave school or be whipped."

PROFESSIONAL ADVERTISING. — Among the various subjects which go to make up the broad topic of legal ethics, the line of demarcation between the legitimate and the reprehensible is perhaps nowhere more shadowy than in the matter of securing professional publicity.

That certain forms of advertising by lawyers are entirely proper will be readily conceded, if the word "advertising" be taken in its dictionary sense of "making known by a public notice." The lawyer who hands out his professional card and he who sends through the mails a formal announcement of the opening of an office or of a change of address or firm style are alike engaged in advertising, but of a kind which the strictest exponent of the dignity of the profession would not think of criticising. Even the legal author who puts forth a treatise bearing his name on the titlepage is making himself "known by a public notice," and if he is a practitioner as well as an author it is safe to assert that he hopes for an accession of clients by reason of the publication.

From these legitimate and even admirable forms of publicity to ambulance chasing and newspaper or other advertisements of divorce lawyers, a specially flagrant example of which was

noticed in the August issue of LAW NOTES, is a far cry. Between the two extremes, and of various grades of merit or the opposite quality, fall such devices as the publication of brief professional cards in the local press, the writing of letters to newspapers on legal aspects of matters of public or general interest (not excepting pending litigation), and the contribution of articles to periodicals, recounting in a style to appeal to the lay reader actual or imaginative experiences in dealing with clients and conducting cases. Advertising by individuals in the guise of a "bureau," "agency," or "association" will readily be assigned to its proper category. Self-invited interviews in newspapers, designed solely to attract attention to the learning and prominence of the interviewed lawyer and the importance of his opinions, are by no means unknown.

A somewhat novel means of publicity, in regard to the ethical status of which opinions may differ according to the point of view, is noted by the *Boston Journal*. It is asserted that in the dignified Commonwealth of Massachusetts obscure lawyers, without influence in the political party of the majority, have been eagerly seeking nominations for public office at the hands of the minority party — not with any idea of being elected, or even with any strong ambition to hold the particular office, but simply for the purpose of bringing their names into temporary prominence and extending their acquaintance among possible future litigants.

We suspect strongly that Massachusetts is not the only State in which the advertising value of a political nomination or even of being "prominently mentioned" for candidacy has been noted by the discerning legal mind. It seems to us, however, that the aspect of any advantage obtained in this way is to be judged rather by the methods adopted to secure the nomination and by the attitude of the nominee before the public than by the mere fact that nomination is desired because of the publicity it affords.

Correspondence.

TECHNICALITIES AND THE LAW'S DELAY.

To the Editor of LAW NOTES:

SIR: In your September issue you publish an article by Mr. W. T. Pigott, entitled "A Proposed Change for the Worse." He criticises the remarks of President Taft, advocating a statute prohibiting reversals unless the appellate court, after the consideration of the whole record, could declare either that the judgment of the trial court was for the wrong party, or that a different judgment would have been rendered if the errors complained of had not been committed. He mentions the fact that the legislature of Missouri passed a bill providing that courts may not reverse or remand any judgment rendered in any civil or criminal case on any ground unless the court, after an examination of the entire record, can say that the judgment of the trial court was for the wrong party, and that, but for the errors complained of, a different judgment would have been rendered.

In my judgment this is a good law, and ought to be enacted in every State in the United States. It is, however, not new, because some of the courts have adopted a rule which has had practically the same effect as this statute. Here in Tennessee it has been the rule, announced in numerous cases, that the Supreme Court will not reverse the lower court where the justice of the case has been attained, for irregularities in the proceeding by which the final result has been rendered. In the case of Givens *v.* The State, 103 Tenn. 648, the court said: "There is a strong and growing inclination of the courts, repeatedly announced, to escape from the embarrassments of technicalities that are 'empty and without reason, and tend to defeat law and right.'"

In the case of State v. Wilson, 109 Tenn. 178, the court said: "When the evidence is plain and convincing, and no plausible excuse can be offered, and it is apparent that an inexcusable and unprovoked crime has been committed, this court, in the interest of the public good, and in order to subserve the public welfare and preserve the peace of society, will not permit an offender to escape through mere irregularities and technicalities, nor through errors which it can see have not operated to the prejudice and hurt of the defendant."

This case has, however, not always been followed, and it would have been desirable if this rule had been enacted into a law.

Mr. Pigott urges, as objections to this statute, that where certain evidence was excluded by the lower court, the appellate court could not say that the judgment of the trial court was for the wrong party, because nothing appears from which the court can determine that the judgment should have been for the other party. He also refers to a trial for murder, where the court erroneously excluded evidence tending to prove an alibi, that the prisoner was convicted and sentenced to be hanged, and that the appellate court is powerless because of this statute; that it cannot say that the judgment was for the wrong party, and that it cannot say that but for the errors complained of a different judgment would have been rendered. I do not know what the practice is in Montana, but here in Tennessee, and I take it in most jurisdictions, the excluded evidence may always be incorporated in the bill of exceptions, and the appellate court can determine, from this evidence, whether it was erroneously excluded, and whether or not, if it had been admitted, a different result would have been reached. I cannot see that any of the objections urged by Mr. Pigott were well taken.

Judge Taft is clearly right in his statement that one of the greatest evils in this country is the delay, both in the trial of criminal and civil causes. Notwithstanding the guaranty of speedy trials in the constitutions of many of the States, justice still travels with "leaden heel." While there have been great improvements in transportation and communication by means of railroads, telegraph and telephone lines, electric cars and automobiles, the courts are about as slow, and the delay is as great, as when judges and lawyers rode horseback through the mud from one court to another.

Some years ago Justice Brewer, in an address, advocated that a statute be enacted abolishing appeals in criminal cases. That would be a very radical measure, but with between eight and ten thousand homicides annually in the United States there is certainly need for reform, and for a more efficient administration of criminal laws.

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And in civil cases the delays are also great. Every lawyer understands that the plaintiff in a damage suit, if he is without means, as some one very happily expressed it, "can be kept pawing indefinitely in the vestibule of the temple of justice," and if he does get in, his case may be reversed several times on appeal upon technical questions. He may, at first, be very confident and determined to fight his case to the finish, but after he has learned, from sad experience, the great delays and the difficulties which confront him on every side, "the native hue of resolution becomes somewhat sicklied o'er with the pale cast of thought," and he becomes eager for a compromise.

Judge Taft's experience on the bench impressed him with the great injustice of delays in civil and criminal trials, and his efforts in urging reforms along this line merit the highest commendation from all good citizens, regardless of politics.

C. J. ST. JOHN.

BRISTOL, TENN.

POLICE METHODS OF PROCURING EVIDENCE.

To the Editor of LAW NOTES:

SIR: Your excellent comment, "Up-to-date Police Methods," in LAW NOTES of September, that brings into greater publicity Mr. Justice Crane's opinion reported among the memoranda in the *New York Law Journal* of August 12, 1909, suggests that "it is rather surprising to learn that the activities of the police include the furnishing of public moneys to young officers in order that they may spend them on, or in the presence of, strumpets and thereby obtain evidence that the place suspected of being a disorderly house is in fact so." Unfortunately this ancient evil is of such common occurrence as not to be at all surprising, in the sense of being novel. In an article entitled "Police Power and the Police Force," contributed to the *North American Review* of April, 1902, I ventured to draw attention, as delicately as possible, to this pernicious custom, and to the position taken by former Police Commissioner, now Major-General, Frederick D. Grant, in reference to it. General Grant, dissenting from his colleagues, voted to dismiss the charges against Police Captain Eakins, accused of neglect of duty in permitting certain evil resorts to exist, and based his dissent upon the ground that if the uniformed police force were required to procure evidence against vicious resorts by the methods of the prosecuting witnesses, the necessary result would be so to deprave the men that they would turn to blackmail as a cleaner employment. The Appellate Division of the First Department (People *ex rel.* Eakins *v.* Roosevelt, 166 App. Div. 364), while upholding the dismissal of the accused officer, sustained Commissioner Grant's disapproval of the prosecution's methods, saying: "If evidence as to the character of such houses could only have been obtained in the manner in which the witnesses for the prosecution obtained it, the findings would hardly be justified." This ruling was a distinct advance beyond that of the old General Term in the cases, reported without opinion, of police officers Horan (35 Hun 671) and Blonk (45 Hun 589). Both of these men were dismissed from the service for committing immoral acts in order to make evidence. Blonk's case is quite unreportable. It is said that the *per curiam* opinion in it is not to be found in the records. The accused made no concealment of the facts, but testified that he was as thorough in his particular endeavor as are those officers who under instructions drink whiskey in excise cases. That excellent commissioner, the late Joel B. Erhardt, promptly dismissed the zealous officer, who, however, was reinstated upon the ground that his offense was committed in the line of duty. Horan's captain bade him get evidence against the notorious "The Allen's" dive, and gave him money for the purpose. Horan, having spent the money elsewhere, pawned his overcoat for two dollars, and being found drunk and disorderly in Allen's place, was dismissed from the force; but as he became drunk and disorderly in the line of duty the Appellate Court reversed the dismissal.

General Grant, disapproving of such methods, called before him a number of police officers and examined them as to the effect of such procedure upon the force. With one sole exception they testified that it was demoralizing to the men, that the married officers were ashamed, as they should be, to face

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their families after such details, and that the only men who cared for such "duty" were the shirks, who, on such assignments, are not under surveillance, and the concupiscent, who are enabled to enjoy immorality at public expense. Reducing this testimony to affidavits, copies of which are in my possession, Commissioner Grant presented them to the then mayor, Mr. Strong, and declared that he would resign his commissionership rather than countenance such methods. His resignation was accepted.

A terrible comment upon this evil procedure was made by a distinguished specialist in New York city, who encountered in his practice the case of a police officer whose sin, committed "in the line of duty," was visited not upon him only, but — as it is written it shall be — upon his children.

It is not, as Mr. Justice Crane justly said, necessary to adopt such vile means in order to secure convictions; but if it were necessary the end would not justify them, and the rule of evidence should be changed by statute, if need be, or prosecutions should be abandoned. When writing the article referred to, I asked a judge of the then existing Court of Special Sessions whether he could cite any authority holding that it is necessary, in order to secure convictions, for witnesses to testify that they had drunk liquor in excise cases or adopted in other cases the methods you refer to, which are those followed by certain of the witnesses against Captain Eakins. He said that he knew of no such authority; but that it was customary to require such evidence. There are many authorities to the effect that circumstantial evidence is sufficient. To require such direct testimony as Mr. Justice Crane condemned is to sanction vice in order to punish it. Policemen debased enough to engage in vice as matter of business will scarcely regard lying and extortion as grave offenses. Prosecutors tempted by the desire of making a record for "efficiency" may approve of these abhorrent performances, but certainly the remedy is as bad as, if not worse than, the evil, which, despite this heroic treatment, persists undiminished. The policeman's primary duty is to protect life and property and to preserve public order in the streets. To make him a tippler and a frequenter of brothels is going contrary to law, morals, and elementary common sense, without any compensating good. It is direct encouragement to blackmail and oppression. Wholesome minded persons who desire a police force of honest men are indebted to every judge and to every journal that lifts up a voice against this corruption of public servants.

W. A. PURRINGTON.

NEW YORK, 1908.

FOREIGN LAWS AND LEX FORI.

To the Editor of LAW NOTES:

SIR: It was decided in Cuba Railroad Company *v.* Crosby, 170 Fed. 369, which you notice in the October LAW NOTES, that where a cause of action arises in a foreign country, *in the absence of proof as to what the law on the subject there is,* the court will apply the law of the forum, as consonant with its idea what is just and right, and therefore presumably the law of the place where the case arose. The case recognizes that if the law of the foreign country is proved, it controls, and only in the absence of any showing as to what this is, is the presumption made. This is emphasized by Judge Gray's dissent, his idea being that it was essential to prove what that law was as a part of the plaintiff's case. It seems to me that in your notice of the case you have missed this point, which is very important.

R. W. ARCHBALD.

SCRANTON, PA.

[A re-perusal of Judge Archbald's learned opinion in this case fails to convince us that our statement of the decision was inaccurate. The point to which he alludes in his letter was not decided in the case and could only be inferred from the language of the opinion. — ED. LAW NOTES.]

DIVORCE FOR INSANITY IN FLORIDA.

To the Editor of LAW NOTES:

SIR: On page 130 for October, 1909, LAW NOTES enumerates among causes of divorce in Florida "hopeless insanity." This is an error. For a short time, between legislative sessions, postnuptial insanity was a ground for divorce here, but the law was promptly repealed, and that infamy departed our fair State.

GEO. U. WALKER.

JACKSONVILLE, FLA.

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Law Notes

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Darkest Washington.

THERE are more law students in the schools of Washington, D. C., than in those of any of the States with the exception of New York and Illinois. The night law school particularly thrives at the capital. Department clerks, conforming to no standard of preliminary education, study law and attend lectures after office hours, and in three years receive their diplomas. This industry of turning out lawyers in the District of Columbia between the end of a boarding-house dinner and the rise of the curtain at Kernan's palace of select vaudeville has recently been denounced by the retiring dean of the George Washington University law school, William R. Vance. "So far from being the greatest centre of legal learning in the United States, the shades of night have fallen darkly upon legal education in the District, and its crowded law schools, with the exception of one or two, have steadily regarded the main chance of accumulating tuition fees and turned a deaf ear to the great cry of the public for better trained lawyers rather than more lawyers." Dean Vance was so much in earnest that he declared it to be the duty of Congress to interpose in the interest of the public. On the other hand, some Washington lawyers unkindly retort that the roar of heavy artillery is often used to cover a retreat, and that the dean himself had an eye to the "main chance" until he was quite ready to move up to Yale.

The Cork Leg Case.

THE so called "cork leg case," in which Justice Garrison of the New Jersey Supreme Court seems to hold that a verdict for damages for the loss of a limb will be set aside for the failure of the jury in estimating the damages to consider the mitigation of the injury afforded by the advancement that has been made in the art of producing and fitting artificial limbs, has been the subject of much comment and criticism. The verdict of the jury, which was for $8,500, was awarded a four-year-old girl, who had lost a leg in a trolley car accident. This verdict the judge declares excessive for the reason that the child's parents are legally liable for her support during her nonage, so that the sum awarded by the verdict, if properly invested, would at the expiration of her infancy amount to double the sum awarded. He adds: "The verdict also fails to give due weight to the skill with which mechanical surgery adapts artificial limbs in a favorable case such as this." That the verdict would have been set aside on this ground alone is not certain, though such an inference may be drawn from the judge's statement. So construed the decision is a remarkable one.

"Gentlemen of the Jury, How Much?"

THE measure of damages in a personal injury case presents a complicated question and develops a variety of considerations which when clearly enough defined to form the basis of intelligent judgment and bearing directly upon the amount of damages should be put before the jury in the instructions. The loss of a limb, for example, would not entail the same amount of injury to every person. No argument is required to show that a chorus girl would be entitled to greater damages for the loss of a leg than a seamstress, and that the loss of an arm by Christy Mathewson would have to be compensated in a greater sum than the loss of that useful member by a night watchman, and we take it that in a proper case the jury should be so instructed. Similarly if the skill of man has devised a substitute for a human member or organ the damages occasioned by its loss are necessarily reduced in proportion as the substitute satisfactorily answers the requirements of the original. It will not do to say that a jury in considering the damages of a person who has had his front teeth knocked out must assume that the unfortunate will have to go around for the balance of his life with his toothless face exposed to the gaze of the world. On the contrary, they should be told to consider the amelioration of the injury which dentistry makes possible. And in the case of the loss of a limb, if there is evidence that such a degree of perfection in the making and fitting of artificial limbs has been attained that a limb of cork or other material can be secured by the victim which will to a measurable extent reduce the inconvenience of his loss, we should say that such evidence is for the jury under proper instructions, and that the refusal of the trial judge to charge the jury to consider it on the question of damages would be reversible error. But to set aside a verdict which is at all reasonable in amount, because in the opinion of the appellate court the jury has not sufficiently considered the utility of a cork leg, is a different question, and with all deference to the learned New Jersey court the decision above referred to is not one to be highly regarded. The jury evidently decided that all the manifold advantages to be derived from the wearing of a cork leg did not reduce the plaintiff's damage below the sum of $8,500. It must take some judicial assurance to say that the damage was necessarily, and as a matter of law, less. The general attitude of the courts on this subject is voiced by the chief justice of the State of Washington in a very recent decision, affirming a judgment awarding $25,000 damages for the loss of a leg. He

said: "There is no fixed standard by which damages in this class of actions may be ascertained. . . . Such questions must be left to the sound sense and sober judgment of juries, and courts may not interfere unless passion or prejudice has intervened, or there is no evidence to support the verdict." In a New York case decided in 1891, a boy about three years old who lost a portion of a leg by the negligence of a street railway company, was awarded $25,000 damages, and the Court of Appeals affirmed the judgment. Justice Dykman of the Supreme Court said: "The child has lost his leg, and must go through life maimed, and we cannot say the verdict is more than sufficient for his compensation for so great a calamity." Making due allowance for any difference between the value of legs in New York and New Jersey, it will be seen that the manufacturers of artificial limbs must have been making some progress in their art since 1891. The lay criticism of the New Jersey decision seems to be directed at the proposition that the perfecting of artificial limbs is a proper matter to be considered on the question of damages. That it is a proper consideration we have no doubt.

Newspaper Contempt.

ABOUT once in a year a certain class of newspapers have to be forcibly reminded that it is unlawful to comment in a manner liable to interfere with the administration of justice, on a case pending in court. The reminder generally comes in the form of a substantial fine. Then there is printed much about the right of free speech and deadly blows at fundamental safeguards of human rights. "A Judicial Ruling That Should Rouse the Nation" are the words which head the comment made by a Boston magazine on a case of this kind which arose in the West. It seems that a Colorado judge fined for contempt an editor, who, while a civil case of a public nature was pending in court, asserted that the statements contained in the defendant's answer were false. The editor was not allowed to justify by proving the truth of the allegation contained in his printed statement.

This is commonplace to the lawyer. When issues of fact are before a court, they are to be determined without outside interference. When a case is finished courts are subject to the same criticism as other people, but, as the Supreme Court of the United States has said, "the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."

The United States Supreme Court Vacancy.

THE death of Mr. Justice Rufus W. Peckham, of the United States Supreme Court, a summary of whose life and activities will be found elsewhere in these columns, has led to much speculation regarding his probable successor. Innumerable candidates have been presented by the press of the country, and their availability or lack of availability minutely considered. That so much attention should be paid to the vacancy by laymen shows a deep popular interest in our greatest judicial tribunal and a recognition of the tremendous consequences which have in the past followed its actions and are in the immediate future likely so to do. It is expected that political and geographical considerations as well as considerations of age will influence the President in the selection of a successor. Mr. Justice Peckham was from the second circuit, and his death leaves this important circuit without representation. The appointment of his successor from another circuit would not be without precedent, as the resignation of Mr. Justice Shiras, who lived in the third circuit, was followed by the appointment of Mr. Justice Moody from the first circuit, already represented by Mr. Justice Holmes. Moreover, the fourth circuit has been without a justice since the death of Chief Justice Taney. But these are not precedents to be followed, except in rare instances, as any circuit is quite large enough to furnish from time to time an able jurist, and particularly the second circuit, which embraces the great State of New York. As to political considerations it might be said that as Mr. Justice Peckham was a Democrat, a Democrat should be appointed to succeed him, particularly as the bench is at present made up of six Republicans and only two Democrats. A quite recent precedent for the appointment of a Democrat by a Republican President exists. Thus in 1893, on the death of Mr. Justice Lamar, President Harrison appointed a Democrat, Judge Howell E. Jackson, of the Circuit Court, to the vacancy. So much legislation, the constitutionality of which is passed upon by the Supreme Court, is of a political character that a Republican President might very well feel that the bench should not be too strongly Republican, knowing, as he must know, that a judge, however upright he may be, cannot help being influenced by his political views when a question presents itself that must be decided without any direct authority. Age too is looked upon as an important consideration in the appointment of a justice of the United States Supreme Court. It has been said that only six men above sixty years of age have ever been appointed to the bench, and that the average age has been something over fifty-one years. It would seem, however, that while it may be desirable that a man without judicial experience should not be appointed who is over sixty or sixty-two years of age, a man with judicial experience should not be discriminated against because of such fact provided he is vigorous in mind and body. The ripened jurist ought to be a better judge, as a rule, than a younger man with as much native ability. Mr. Justice Holmes was some over sixty at the time of his appointment, but he had had a judicial experience extending over twenty years on the Supreme Judicial Court of Massachusetts, and was splendidly equipped for his more important duties.

Penalizing Appellants.

THE subject of the law's delay is becoming hackneyed. Every one takes a whack at it nowadays, from the college graduate with his commencement thesis on "The Tardiness of American Justice" to the editor of the daily press with his superficial criticism of a science which he does not seem to be qualified to discuss from a scientific standpoint. It is so much easier to follow beaten paths than to thread one's way through the wilderness of originality. The latest revival of the law's delay agitation is the result of the act of an Indiana judge in penalizing an appellant, under the provisions of an ancient and neglected statute, by imposing a fine equal to ten per cent. of the amount of the judgment appealed from, because, in the opinion of the court, the appeal was vexatious and intended for delay. In commenting upon this incident, the papers take occasion to generalize concerning "dila-

tory technicalities," and "legal abuses," in a manner which is not at all convincing. Says one: "A great deal of the time of the courts is taken up with hearing technical objections. Attorneys who find the law or the facts against them watch with eagle eyes every step in a proceeding for some hook on which to hang an objection. The lawyer is rare, indeed, who is not trained to pick a technical flaw when he has a 'bad' case." Says another: "The work of the several courts is delayed not only by the unconscionable time that is given to the trials of causes, but by appeals that are without merit. An appeal is hung upon any trifle that can be discerned by the practiced eye. President Taft and many others before him have denounced as disgraceful the reversal, on trivial technical grounds, of verdicts rendered in the trial courts." And still another paper speaks of the pressing need of "immediate legal reform." It does seem that a great deal of such talk is misdirected and unjustifiable. The error lies in laying the blame at the door of the law itself. In respect to the action taken by the court in the case cited, it should be noted that the "law" was beyond criticism, for it was by virtue of the provision of a statute that the penalty was imposed for delay. And the court was equally beyond criticism in its prompt and vigorous administration of the law. The only one left to criticise, then, is the attorney in this particular case who advised an obstructive appeal, and while he undoubtedly deserved censure, such instances are certainly not so common as to justify general condemnation of the law, the courts, and the lawyers. The Indiana statute is a meritorious one beyond question, and its counterpart might well be found on other statute books. In fact, a similar statute has existed and has been enforced as the occasion required in Illinois for more than fifty years. But such a statute, after all, should be considered as aimed at the few, rather than the many, just as any other penal or criminal statute finds its excuse for being, not in the shortcomings of the law itself, but in the fact that the law is in the habit of being violated.

Reversals on Appeal.

IN connection with the statement quoted in the preceding paragraph to the effect that the "reversal, on trivial technical grounds, of verdicts rendered in the trial courts" is disgraceful, it would be extremely interesting to know the facts as to the proportion of cases reversed to those affirmed by the appellate courts of this country. One easily gathers the impression, from the large number of cases which are sent back for new trial, that the reversed case is the rule, rather than the exception. This is probably not true, taking all the jurisdictions together, in spite of the fact that in many States the appellate tribunals reverse on the facts as well as the law, and in spite of the well-known tendency of many courts of last resort to require a rigid adherence to the technical rules of pleading in both civil and criminal cases. The exact figures, however, could not easily be obtained. It has been estimated that about twenty-five thousand opinions of the courts of last resort in the United States are reported annually. Add to that number the cases passed upon exclusively by the intermediate appellate tribunals, and the cases in which no opinion is delivered, and the total number of cases decided should reach fifty thousand a year. The preparation of statistics as to this vast number of decisions would involve no little time and labor. It is possible, however, to get an idea of the situation in respect to affirmances and reversals generally, by studying the statistics applicable to some particular court, which is thoroughly representative, and as to which the figures are easily accessible. Such a court is the New York Court of Appeals. For some years past, in each volume of the New York Reports there has been published a table of the cases affected by the decisions reported in the volume. These tables furnish just the information desired. The last six volumes (190–195) cover a period of practically two years. In that time the court finally disposed of 1,155 cases. In twenty-five of these cases, the judgment of the lower court was modified, and this number should be excluded from the reckoning as it is impossible in every instance to determine the final disposition of the case. Of the remaining 1,130 cases, judgments of affirmance were rendered in 835 instances, and of reversal in 204 instances; in 85 cases the appeal was dismissed, and 6 appeals were withdrawn. The proportion of affirmances to reversals, therefore, was 926 to 204. In other words, but two out of every eleven cases, in round numbers, were reversed and sent back for new trial. These figures do not reveal a very alarming situation in New York State, though that jurisdiction has, in fact, been characterized as one of the worst offenders in the matter of the law's delay. If nothing more startling can be shown as to the other jurisdictions, the charge that the reversal of verdicts has reached a point where the practice can be termed "disgraceful" must be considered as not proven.

Reforming Procedure.

As far as we have observed, suggested remedies for law reform are almost entirely legislative or the authorized promulgation of rules of court designed to simplify and expedite judicial procedure. But it seems to us that lawyers practicing at the bar are responsible in a very considerable degree for various conditions demanding improvement. If that is true, the movements to elevate requirements for admission to the bar are unquestionably steps in the right direction. Why is it that in some of the States questions of pleading and practice discussed and decided by appellate courts are vastly more numerous than in other States where there is about the same quantity of litigation and the same right of appellate review of rulings of trial courts? In one of the Middle States the reports contain an amazing number of cases where litigants have to wait for questions of pleading arising on demurrers to complaints or answers to be determined by an appellate court. And each party has to pay his counsel for arguing those questions even if they are not the sole grounds for appeal. Are the lawyers in that State incompetent to frame pleadings that will be invulnerable, or incompetent to perceive the sufficiency of their adversary's pleadings? Look at the *eighty-one* paragraphs under the title "Pleading" in the reporter's index to 41 Ind. App. and the *eighty-five* paragraphs under the same title in 170 Ind.!

Again, the question whether the trial judge erred in allowing or refusing to allow an amendment of a pleading seems to us unnecessarily common in appellate courts. Do good lawyers who have sufficiently informed themselves of their client's cause of action or ground of defense in order to give him intelligent advice as to the wisdom of

bringing a suit or resisting a claim, habitually expect that they will find it necessary or expedient to amend their pleadings after they have once been filed, and thus raise debatable questions foreign to the merits of the case?

Reformed Procedure Not a Cure-All.

ON another question of practice, too, the highest courts in some States have sent cases back for a new trial so frequently in the last several decades that the language the court now uses in reversing for the error is oftentimes far from complimentary to the judge who committed the error or the lawyer who led him into it. For example, the Illinois Supreme Court in a multitude of cases since *Brennan* v. *People,* 15 Ill. 511, decided in 1854, has held it to be reversible error to instruct a jury that a witness may be impeached so that the maxim *falsus in uno, falsus in omnibus,* may be applied to his testimony by showing that he has testified falsely, without requiring the jury to believe that such testimony was *wilfully* false. See cases cited in *Godair* v. *Ham. Nat. Bank,* 224 Ill. 572, and note to the same case in 8 Ann. Cas. 447, 450. The Illinois Appellate Courts have also diligently called attention to the same error. See for a comparatively late case *Hughes* v. *Ferriman,* 119 Ill. App. 169. And yet in *People* v. *Welch,* 143 Ill. App. 191, decided last year, the appellee's counsel asked for, and the trial judge gave, an instruction plainly within the condemnation of those numerous cases in their own State. It cannot be denied that this instruction is usually so harmful as amply to justify reversal, for that reason alone, of a verdict and judgment against the party complaining of it; and in nine cases out of ten where it is given it does cause a reversal with the consequent delay and expense. Surely no reforms in procedure can be devised that will cure such an evil; all is vain if lawyers and judges will not keep themselves informed of the plainly expressed rulings of their highest courts that are repeated year after year.

Hypnotism and Criminal Law.

THE death of the subject of a traveling showman who styled himself "professor" of the art of hypnotism raises rather an unique question. It seems that the "subject" was hypnotized, his feet being placed on one chair and his head on another, and after his body had been made "rigid," it was subjected to tests, among which was that of sustaining great weight. When the hypnotist attempted to bring his subject out of the cataleptic state, the latter collapsed. Attempts to restore him to consciousness proved futile, whereupon he was pronounced dead. An autopsy revealed the fact that death had resulted from the bursting of the aorta. As a result of the death of the subject the hypnotist has been held to answer therefor.

The question, of course, is, whether the hypnotist can be held criminally responsible for the death of his subject? To fix criminal responsibility upon the operator it would seem to be necessary to show intent on his part to do actual bodily harm, or such acts and conduct on his part as would amount to a negligent or reckless regard for human life.

The question of intent to do actual bodily harm may be dismissed without comment as unlikely and absurd. Assuming that there was such intent, then it would have to be shown that it is or was possible to produce such effect upon the mechanism of the human body as would cause death in the manner in which it was produced. This, however, would not seem to have any foundation in reason.

On the other hand, if criminal responsibility is based upon negligent or reckless regard for human life, then the inquiry is as to the nature and effect of hypnotism upon the human body physiologically; whether the condition of the subject while in the cataleptic state is such as to render dangerous tests to which the person is subjected, especially such tests as were used in the case in question. While it might be considered sophistry to say that there can be no evil effects physiologically, such as would produce death in a person of normal health, from the fact that rarely, if ever, death has been known to occur to the subject, or at least been attributed to that cause solely, yet this fact would certainly have weight in refuting an affirmative contention of that sort. Even if the subject is not physically sound and has some infirmity necessarily unknown to the operator, can the latter be held for the accidents which may result on account of the unknown infirmity when the subject has freely consented to be put through the tests for which the operator employs him? It does not seem that criminal responsibility could attach under such circumstances as long as the law does not prescribe the limits of hypnotic tests or exhibitions, or place any prohibition thereon.

Regulating Practice of Hypnotism.

SHOULD public exhibitions of hypnotic tests by so-called "professors" of the art of hypnotism be allowed? It is true that in the few cases in which courts of last resort have been called upon to consider hypnotism in any manner, little aid is rendered in answering this question. In *State* v. *Lawson,* (Del. 1907) 65 Atl. 593, the court held that personal treatment of one person by another by hypnotism alone was not practicing medicine within a statute requiring a person "prescribing remedies" to have a license. In *People* v. *Worthington,* 105 Cal. 166, and in *People* v. *Ebanks,* 117 Cal. 652, the court in each case declared that evidence that the accused committed the homicide charged while under hypnotic influence was not admissible in his defense or as an excuse for the crime. In *State* v. *Donovan,* 128 Iowa 44, which was a prosecution for seduction, the prosecutrix claimed that the defendant, who was known to her to be a married man, had obtained possession of her person by hypnotic influence. Evidence of this was admitted by the trial court, as was also evidence that the defendant had accomplished his purpose through other means such as flattery and love-making. The Supreme Court of Iowa in considering the case on appeal sustained the conviction, but said: "The connection of hypnotism with this case is merely a matter of evidence, not requiring extended discussion."

While the courts have not seemingly taken the subject of hypnotism seriously when it has been urged in defense to the commission of a crime, if it be true as it is asserted by reputable physicians that hypnotism may be used by unscrupulous persons to commit crimes upon the person, especially of women, or if there is reasonable cause to believe that the commission of crimes may be procured through hypnotism, it seems that the public exhibitions thereof should be eliminated and safeguards thrown

around the practice. If danger in any form lurks in its use, its practice should be so regulated that only those competent and skilled therein may resort to it, and then only for legitimate purposes.

Life Insurance and Death at the Hands of the Law.

THE Supreme Court of Virginia has just rendered a decision in the matter of the insurance policies on the life of Mayor McCue, of Charlottesville, Va., who was hanged a few years ago for the murder of his wife. The court holds that the fact that the insured met death at the hands of the law vitiates the policies and that the estate of the insured cannot recover thereunder. Shortly after McCue's conviction and execution an article in LAW NOTES commented upon the case (8 LAW NOTES 465), expressing the view that although the law on the point was apparently settled, the doctrine of the few cases then decided seemed to be indefensible from the standpoint of either logic or justice. That doctrine, first enunciated in the "Fauntleroy case" (*Amicable Soc.* v. *Bolland,* 4 Bligh N. S. 194) and subsequently adopted by the United States Supreme Court (*Burt* v. *Union Central L. Ins. Co.,* 187 U. S. 362) is, in brief, that to allow a recovery upon a life insurance policy under such circumstances would offend public policy by tending to induce crime. In other words, it would be an incentive to every insured person to commit a capital felony and get himself hanged if he knew that by so doing he could secure to his beneficiaries at once the proceeds of his insurance policies. It would serve no good purpose at this time to review the reasoning upon which the courts have founded such a doctrine, or to reiterate the arguments advanced in the article above referred to against the soundness of the doctrine. It may be noted, however, that in a recent Illinois case (*Collins* v. *Metropolitan L. Ins. Co.,* 232 Ill. 37, 13 Ann. Cas. 129), the Supreme Court of that State emphatically repudiates such an interpretation of the demands of public policy, characterizing it as bordering "closely upon the absurd."

Women in Law Schools.

A MISS MILHOLLAND, who is described in the daily press as "the young suffragette leader of this country and Great Britain," has been refused admission to the Harvard law school. So far as appears she is the only woman who has ever applied for admission to that school. She returned to New York this fall from England, where she had spent a year in a fruitless effort to gain admission to the famous law schools of either Cambridge or Oxford. The reason for her exclusion from Harvard is, as stated by Dean James Barr, that "after careful consideration the faculty decided that if she was admitted to the school we could not discriminate against other young women who applied," and that "the Harvard law school shall remain a school for men only, until such time as the board of government sees fit to change its position with regard to co-education." If Miss Milholland could content herself with the opportunity to acquire a legal education without the notoriety of forcing herself into an institution where no woman has ever been before, she could find accommodation in a number of reputable law schools which admit women, but with her the acquisition of legal learning seems to be a secondary consideration. As to the admission of women to law schools we can easily understand the position of the schools that refuse to admit them. Women seem to be an anomaly in law classes, as they certainly are in the practice of the law. To instructors and the male members of a law class, the presence of women in the class must be productive of some constraint, if not embarrassment, when certain subjects of the law are under discussion. So, the general objection to the mingling of the sexes in colleges applies with additional force to law schools. With our limited knowledge of the mental processes of woman we question her fitness for the legal profession. Judge Grosscup in a recent address before a woman's club in Chicago said: "You can't be theologians, because you haven't the power of analysis; you can't be lawyers, because you are devoid of the reasoning faculty; you are not successful scientists, because you can consider only one detail at a time; you are only occasionally successful in business, and you succeed only in those branches of medicine which call for the exercise of the nursing instinct." We are inclined to the belief that of all the pursuits above mentioned, the one for which woman is least adapted by temperament and intellectual habit is the practice of the law.

THE LAWYERS' COURT OF COMPULSORY ARBITRATION.

Written for LAW NOTES by J. McF. CARPENTER, the Pittsburgh Bar.

IT is gratifying to all who have taken an active part in promoting the cause of arbitration and demonstrating what can be accomplished, to discover that the experiment of the Allegheny County Bar Association is attracting wide-spread attention. This new court is the outgrowth of a condition, not a theory. As the complaint against the law's delays is well-nigh national the causes of delay must in a general way be common to all the States. I am not able to specify particulars in which the constitutions and statutes of other States are similar to the constitution and statutes of Pennsylvania, and so leave their discovery to those who read LAW NOTES,

As a result of an enormous increase in business our courts have enough causes on the docket to keep them busy for two or three years. With this condition confronting us, and steadily growing worse, the bar found it necessary to take some action. What is known as the Lawyers' Court of Compulsory Arbitration was proposed by H. M. Scott, Esq., of our bar, and a committee of experienced attorneys, with Mr. Scott as chairman, was appointed with instructions to embody his plan in a report; which was done, and the report was, after full consideration, adopted, and shortly thereafter the Lawyers' Court was organized and began the hearing of causes. It is worthy of note that the court is not organized by authority of law, but by agreement among practicing lawyers. It is dependent for its success wholly upon the co-operation of attorneys. It is founded upon our Compulsory Arbitration Act of 1836, which provides *inter alia* that —

"It shall be lawful for either party in any civil suit or action, his agent or attorney, to enter at the prothonotary's office a rule of reference, wherein he shall declare his determination to have arbitrators chosen on a day certain to be mentioned therein, not exceeding thirty days thereafter, for the trial of all matters at variance in the suit between the parties."

This Act of 1836 contains many provisions regulating the proceedings before arbitrators, the filing of the award, appeal to the court, etc. It confers upon the arbitrators power to require the production of books; to judge of the competency and credibility of witnesses; to administer oaths; to adjourn meetings; to decide the law and the facts; to issue subpœnas and attachments for witnesses; and to punish for contempt. Certain actions do not come within the provisions of the Compulsory Arbitration Act. In the earlier days arbitration, either compulsory or by agreement, was quite common, but later was rarely resorted to either by agreement or compulsion. It is quite probable that among other reasons for the gradual abandonment of arbitration the following were dominant: the serving of the several rules at intervals of many days; the right of each party to name one arbitrator and in case of failure to agree as to the third man, the right of the prothonotary to select; the delay in hearing; the numerous adjournments; and the feeling on each side, not always unfounded, that the arbitrator chosen by the opposite party would favor the attorney who selected him. Certainly the facts mentioned had a tendency to make this method of adjudicating causes unsatisfactory.

The method of procedure suggested to and approved by our Association is as follows: After a cause is at issue the attorney for either side may enter a rule to choose arbitrators, for which he pays fifty cents; the prothonotary sets the day and hour for choosing arbitrators, which must be within thirty days after the date of rule; notice is served upon counsel, and at the time appointed the arbitrators are chosen. So far the proceedings are in conformity to the statute of 1836. If opposing counsel does not attend the prothonotary may, on request of counsel taking the rule, nominate the men known as official arbitrators. These "official arbitrators" are members of the bar selected by the President of the Association and who have consented to serve for one month. As above stated they are not provided for by any Act of Assembly. It was deemed wise to permit the President to name six for each month, of whom three are alternates. The selections are made at least two months in advance. This does not conflict with the right to proceed under the Act of 1836, but since the new method has been inaugurated I have not heard of a single instance in which any objection was made to the arbitrators appointed by the President of the Bar Association, but on the contrary have found the attorneys willing, in every cause of which I had personal knowledge, to proceed before two where the third could not be present, and in several instances heard counsel offer to submit the cause to one if the other two could not be present at the time fixed for hearing. These facts are mentioned as tending to show the spirit that prevails among our attorneys and their confidence in the good judgment of Frank C. Osborn, Esq., President of our Association.

An examination of our records discloses some interesting facts worthy of mention. The first is, that several cases submitted to the Lawyers' Court are not within the provisions of the Compulsory Arbitration Act. Second, no complaint has been made respecting the fee of five dollars allowed each arbitrator and payable as part of the costs, although the Act of 1836 allows but one dollar and fifty cents. When it is remembered that the submission of any cause to this board of arbitrators is voluntary, even though pursuant to rule, but one conclusion can be drawn, to wit, that the members of the bar prefer the new method to the old, which latter is followed only so far as is necessary.

Inasmuch as the first board of official arbitrators was not appointed until June 23d of this year, immediately preceding the summer vacation, it was not to be expected that any marked progress should be made, and yet the report presented to the Association at its meeting early in October shows that down to September 30th eighty-three cases had been placed on the arbitration docket, as follows: assumpsit, 26; attachment in assumpsit, 1; appeals from justices and aldermen, 25; scire facias *sur* mechanic's lien, 5; replevin, 6; sheriff's interpleader, 1; execution attachment, 2; trespass, 12; feigned issue, 1; not disposed of, 4. Of these, 49 were tried, 12 settled, 4 abandoned, and 18 were then pending. Of the eighty-three cases referred, appeals from the awards were taken in slightly more than twenty per cent. One important fact must not be overlooked, and that is the deterrent effect on the bringing of frivolous suits and the taking of appeals from aldermen and justices on any pretext however trifling, thereby delaying final judgment for two or three years. I am informed by the clerk in charge of the docket of the Arbitrators' Court that down to November 11th, one hundred and thirty-four causes have been referred. This does not include the cases in which rules to refer have been entered, but only those that are ready for hearing. While it is true that appeals are sometimes taken, I have not heard any criticism of the arbitrators or of their method of procedure, and on the contrary I have heard many commendatory remarks by counsel against whose clients awards have been filed.

Reference has been made to the fact that causes not within the provisions of the Compulsory Arbitration Act have been submitted to the Lawyers' Court. How many such cases there are I do not know. As indicative of the variety of questions submitted I will mention some cases referred to the board of which I had the honor to be president. Several were for the recovery of small sums, in which the defendants had appealed from the judgment of aldermen. One was for the recovery of damages because of the alleged breach of a parol promise by a landlord to buy in the goods of his tenant and redeliver them and make a new lease. Another was a feigned issue to determine the title to the proceeds of a "beneficial certificate" issued to a member of an association, the proceeds being claimed by the mother as against her daughter-in-law, widow of the decedent. Another was for the recovery of damages against a dentist for alleged negligence in the line of his profession. And another was for damages caused by an automobile that was wending its way along one of our streets about three o'clock A. M. when it "skidded" from its proper path, hurriedly crossed the sidewalk, and *vi et armis* punched a hole in the side of the dwelling of a slumbering German citizen, rudely disturbing his peaceful rest. After our board had heard and decided the case I discovered in the *Central Law Journal*, vol. 69, p. 210, an article quoted from the *London Law*

Journal, from which it appears that the courts of England have decided both ways the question of liability for damages caused by this new [k]night-errant equipage, when it "goes on a skate," and a decision by the House of Lords will be necessary to settle the law. Our board decided the question to the evident satisfaction of both parties, for neither appealed. This statement is true as to the four cases last mentioned, the awards being accepted as final. I have no doubt that other boards have had similar experience.

Our experiment has demonstrated several points in which arbitration before the Lawyers' Court is more satisfactory than trial by jury. In the first place, the cause can be heard without delay. This of itself is a very great advantage. There is no time wasted in the selection of a jury; the "opening" is very brief; the examination of witnesses is more direct; there are no long speeches or impassioned appeals; no "charge;" no lengthy discussions by jurors who have forgotten much of the testimony and misunderstood the charge of the court, or who from motives of friendship or because of enmity line up on one side or the other. The arbitrators can ask questions, and if necessary inquire as to points on which they desire information, and while bound by the principles and rules of law and evidence, can get direct statements and explanations which a jury cannot, and perhaps would not be permitted to hear. Not only these, but other advantages possessed by this method of trial are manifest. In the quiet of the Arbitration Court counsel are less likely to become excited, and are able to and do take a broader view of the case, and not infrequently a suggestion from the arbitrators results in a settlement of all matters in dispute. This statement is based on experience, and will be sustained by every man who has served as a member of the court, and by the attorneys. Our judges have signified their approval of our new court, and our prothonotary, Wm. B. Kirker, Esq., has taken an active interest and rendered efficient assistance in every way possible. He has asked, and our commissioners have granted, an additional clerk to keep the necessary minutes and have general oversight of all papers in suits before the Court of Arbitration. Expressions of approval by business men are heard on all sides, and so far as we can discover the arbitration of causes will be welcomed. Thus far the arbitrators have met in either the room of our Association or in one of the court rooms. It is hoped that permanent quarters will be furnished at an early day. The usual oath or affirmation is administered to the arbitrators in each cause, and witnesses are sworn or affirmed by the clerk. Examinations are conducted as in court, but as stated above the arbitrators do not confine the testimony within strictly technical lines. In other words, they exercise the same powers and pursue similar methods to those followed by a judge who is sitting as a referee or chancellor.

Having demonstrated the utility of such a court, even under present limitations, and dependent though it is for its existence on the voluntary support of the bar, we have determined to ask for legislation that will give it legal standing and render it a more efficient instrument in the administration of justice. Constitutional questions have been raised and discussed touching the power of the legislature to establish such a court, define its jurisdiction, regulate appeals, etc. One of these questions grows out of the provision of Amendment VII. to the Constitution of the United States, which reads as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Another is raised because of the provision found in article 1, section vi., of our (Pennsylvania) Bill of Rights, which reads as follows: "Trial by jury shall be as heretofore and the right thereof remain inviolate." We have another constitutional provision authorizing the legislature to create "other courts," but this is followed by a provision inhibiting the "establishment of courts to exercise the powers vested by the constitution in the judges of the Courts of Common Pleas and Orphans Courts."

In view of these provisions and because of the questions raised, I was requested to prepare a "brief" to be submitted to the Association. This request was complied with, and the brief was ordered printed for the use of members. In answer to the questions raised because of the provisions of Amendment VII. to the Constitution of the United States, my answer was the following quotation from the opinion of Chief Justice Waite in *Pearson* v. *Yewdall,* 95 U. S. 294: "We have held over and over again that article 7 of the amendments to the Constitution of the United States, relative to trials by jury, applies only to the courts of the United States."

In answer to the question touching the power of the legislature to create new forums for the trial of causes and regulate appeals, etc., I cited *Sharpless* v. *The Mayor of Philadelphia,* 21 Pa. 147; *In re Pennsylvania Hall,* 5 Pa. 204; *Rhines* v. *Clark,* 51 Pa. 96; and *Emerick* v. *Harris,* 1 Binn. (Pa.) 415, quoting fully from the latter opinion. In *Rhines* v. *Clark, supra,* Chief Justice Woodward said: "So may trial by jury be withheld from new jurisdictions created by statute and clothed with no common-law powers, as in the instance of the justices' hundred-dollar law." The cases cited fully answer any objection to an arbitration court on constitutional grounds, in so far as it affects the right of trial by jury.

It seems clear that the constitutional inhibition upon the creation of courts to exercise the powers of Courts of Common Pleas, etc., refers to judicial powers, not to the mere adjudication of suits. It would serve no good purpose to quote at length from the opinions above cited; they must be read carefully.

The next step looking to the organization of a Court of Arbitration was the appointment of a committee, with James C. Gray, Esq., as chairman, to prepare and submit the draft of an act to be presented for adoption at the next session of our legislature. This committee requested me to prepare an outline of the proposed act, which I did, and it has been ordered printed. The act will be drawn later. As the matter now stands, it is recommended that said act shall embody, substantially, the following provisions: creating Courts of Arbitration and Reference and providing for the appointment of the members of said court by the judges of the Courts of Common Pleas of the county; providing for the holding of regular sessions of said court in rooms to be provided by the county; for the appointment of a clerk, stenographer, etc., and the payment of salaries by the county; defining the jurisdiction; providing for submission of any civil cause by agreement,

and making it obligatory to arbitrate certain causes; preserving the right of appeal, but limiting it to suits involving more than $100, and requiring security for debt, interest, and costs when an appeal is taken; permitting counsel for either party to order any cause within the jurisdiction of the court upon the arbitration list by *præcipe* indorsed on statement of claim or affidavit of defense; providing that when the arbitrators or a majority are of opinion that under all the evidence plaintiff is not, under the law, entitled to recover, they shall so certify, and on appeal the court shall first dispose of this question; authorizing the courts or any judge to certify suits in equity and for divorce to said court; and requiring the arbitrators individually to hear said causes and certify their findings and conclusions to the court.

Our sole purpose is to provide an efficient court of assistance, and to this end we have submitted suggestions which we trust will be followed by carefully prepared legislation that will protect every man's constitutional rights, and at the same time simplify, systematize, and expedite the adjudication of legal controversies.

Summarizing the foregoing suggestions, they are: That legislation should be procured, safeguarding the right of trial by jury, and regulating its exercise; classifying causes as to subject-matter and amount in controversy, and, within prescribed limits, making arbitration

(*a*) Obligatory on all parties;
(*b*) Compulsory at the election of either party;
(*c*) Permissible, by agreement, in all civil actions;
(*d*) Empowering the courts to appoint official arbitrators, who may, on certificate from the court, individually act as masters in equity and divorce.

We invite suggestions from all who are interested.

MR. JUSTICE PECKHAM.

RUFUS W. PECKHAM, associate justice of the Supreme Court of the United States, whose death occurred at his summer home near Albany, N. Y., on Oct. 24, 1909, came from a family of lawyers. His father, Rufus W. Peckham, was a judge of the Supreme Court of New York, and later of the Court of Appeals of that State. His uncle, George W. Peckham, was a leading member of the Albany bar; and his brother, Wheeler H. Peckham, was a leading member of the New York city bar, who was appointed to the United States Supreme Court by President Cleveland, but failed of confirmation for political reasons.

The subject of this sketch was born in Albany, N. Y., Nov. 3, 1838, educated at Albany Academy, studied law in the law office of Colt & Peckham, Albany, and was admitted to the bar of the city of his birth.

He early showed that he was a public speaker of remarkable gifts and also attracted attention by his learning and culture.

Soon after being admitted to the bar, Mr. Peckham became a member of the firm of Peckham & Tremain, and later of the firm of Peckham, Rosendale & Hessberg, remaining with the latter firm till he ceased to practice and became a judge.

In 1868, at the age of thirty, Mr. Peckham was elected to the office of district attorney of Albany county, and later was, by appointment, the corporation counsel of Albany. His political activities caused him to become a leader of one of the factions of the Democratic party in Albany county, and his influence in political circles led to his nomination as chief judge of the Court of Appeals in the Democratic convention of 1882. He was defeated, however, by William C. Ruger. But in 1883 he was elected a justice of the New York Supreme Court, and three years later was elected to the New York Court of Appeals, where he remained until his appointment to the United States Supreme Court by President Cleveland in 1895.

There is an interesting bit of political history leading up to Mr. Justice Peckham's appointment to the highest federal bench. It is told by the *Boston Transcript*, in the following words:

"The appointment of Rufus W. Peckham came about peculiarly. On the death, in 1893, of Mr. Justice Blatchford, who belonged in New York, President Cleveland sought to fill the vacancy from the New York circuit, first naming Mr. William B. Hornblower, whose confirmation was regarded as so much a matter of course that his name had been entered in all the Washington directories as a resident thereof, and his own plans for undertaking the work were nearly completed. But Senators Hill and Murphy organized a campaign to test whether a Democratic President could make an appointment of this importance from their own State without conferring with them; they gathered enough similarly aggrieved Democrats with them and free-silver Republicans to defeat Hornblower's nomination. The fight then broke out with renewed vigor.

"Straightway the President from one end of the avenue and the Democratic Senators from the other exerted every influence to carry the day. Wheeler H. Peckham, another Democrat of the Hornblower stamp, was nominated. Senator Hill announced that if President Cleveland had only taken 'the other Peckham,' Rufus W., he would have promptly voted for his confirmation. The suggestion was not without its merits, the younger Peckham having from his judicial service been saved from all mugwump activity, while as a lawyer before going on the bench he had rendered conspicuous political service to Mr. Cleveland. In the ensuing contest the Hill faction lost some Democrats, but they picked up several new Republicans who objected to the unseemly scramble over a nomination of this character. Again defeated in the choice of a New Yorker, the President sent for Edward Douglas White, a senator from Louisiana, an eminent lawyer, and one of his strong backers in the Hornblower-Peckham controversies, but who — because a United States senator — would be, under the rules of that body, immediately confirmed. This was done. Two years later, on the death of Howell E. Jackson, Mr. Cleveland restored the New York balance by the choice of the man whom Hill had suggested as a suitable compromise."

Perhaps no justice of the Supreme Court ever devoted himself more assiduously to the duties of his office than did Mr. Justice Peckham. He attended few social functions and accepted no invitations to make public speeches, notwithstanding that he was a speaker of great force and eloquence, and an agreeable and entertaining conversationalist.

The splendid tribute of Mr. Justice Harlan to the

ability and character of his dead associate has been already much quoted. He said:

"Justice Peckham was one of the ablest jurists who ever sat on the American bench. He was absolutely pure in mind and thought and free from everything that would prevent him from rendering an honest judgment in any case brought before him.

"He had strong political convictions, but when on the bench he knew no litigant's politics and cared nothing for them. His sole desire was to administer the law as it was, and to give each party in every case his just rights. I had a great personal affection for him, and he was one of the purest men I ever knew."

Among the many cases in which Mr. Justice Peckham was called upon to write the majority opinion, probably the one which attracted most attention was that of the *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, decided in 1896, about a year after his appointment. This case decided, first, that the Sherman anti-trust act applied to traffic agreements between interstate carriers, and secondly, that the act forbade reasonable, as well as unreasonable, restraint of trade. Four justices dissented from the majority view.

Concerning the first question decided, Justice Peckham said: "The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations, and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce."

Concerning the second question, Justice Peckham said: "It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

Another important case in which Justice Peckham wrote the opinion of the majority of the bench was that of *Ex parte Young,* 209 U. S. 123, decided in 1908. Here he laid down the proposition "that individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action."

Still another important case, the opinion in which was rendered by Justice Peckham, is that of *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, decided at the last term. In this case the court had under consideration the validity of a State act limiting the rates for gas to the prices named therein. It was contended that the act was confiscatory, but it was decided that the court could not declare the act unconstitutional, as it had not been determined from experience that the contention was true.

Justice Peckham in his opinions exhibited an exceedingly clear style, and his reasons made his conclusions

naturally follow. He has been criticised as a conservative, but his position would tend to make him that. We need conservatism on the bench. Legislation for curbing great wealth is all very well, but it should be carefully tested by a body of men who are not too ready to overturn the precedents of the past, yet recognize that the past cannot always be a guide for the future.

AN ENGLISHMAN'S IMPRESSIONS OF OUR COURTS.

[The following article, which appeared in a recent number of the London *Law Journal*, while far from accurate in many of its statements, will doubtless be of interest to our readers as showing how our methods of procedure impress a foreign observer. — ED. LAW NOTES.]

IT is difficult not to write pessimistically about the law courts of America — or it may be fairer to say of New York — because the Americans themselves are so pessimistic about them. They speak openly of the corruption of the bench, the chicanery of counsel, the packing of grand juries in the interests of large corporations. A rich man, it is said, can nearly always escape punishment for a misdemeanor by raising questions of "error on the record," and civil suits against a big trust or combine may be held up for years or more, protracted by different shifts and devices which the law is powerless to check, until the suitor becomes wearied and abandons his case. No doubt there is an element of exaggeration in this talk, but the broad fact remains that the administration of justice is neither as pure nor as satisfactory nor as expeditious as it is in England.

Undoubtedly one of the chief causes of the unsatisfactory condition of the courts is the popular election of the judges. With the single exception of the judges of the Supreme Court of the United States, all the judicial officers are chosen by vote and stand upon party lines. The Republicans and the Democrats each put forward their nominees for the bench, and it is inevitable that party services rather than legal ability are the main qualification of candidates, and party favor rather than legal reputation the chief factor in their election. It results from this system that there is often a want of respect by the bar for the bench. Counsel may know the past history of a judge and consider with reason that he himself is better fitted to lay down the law than the head of the court; and hence arise the unseemly wrangles which often mar the dignity of the proceedings. On the other hand, the judge has often little confidence in the barrister who is practising before him. Many of the American law schools are excellent — as the President of the Law Society pointed out in his address at Newcastle, the school at Harvard is far superior to anything that we have in the way of systematic legal education — but at the same time many American law schools are very inferior. They make inadequate requirements, both in regard to general culture and to legal knowledge, for the granting of a law degree; and of the 18,000 lawyers who have been admitted to the New York bar a considerable number have neither the attainments nor the character which fit them for the conduct of a learned profession. The State, indeed, imposes an examination upon all candidates for admission, but the test is not very searching; it is true, again, that the New York Bar Association now holds an examination into the character of every candidate, and is determined to raise the standard of the profession; so that a steady improvement in this respect is to be expected. But at present the mutual want of confidence between bench and bar strikes the stranger very strongly.

The impression of the want of respect and dignity is deepened by the absence of formal marks of distinction. Judges wear a robe, but the barrister has neither wig nor gown, and the conduct of the case throughout is characterized by a much more free-and-easy way than is conceivable in an English court. A trial before the Supreme Court resembles rather our proceedings before a Master with their quick exchanges of conversation and their unceremonious argument. Yet it is not managed with the same despatch. It is remarkable that a people who are famous for their hustle and their desire to save time should tolerate the slowness in the despatch of legal business which is regular in American courts. The leading cause of this want of despatch in the courts is probably to be attributed to the absence of a specialized class of pleaders.

American experience is very suggestive upon the vexed questions of the fusion of the two branches of the profession and the right of audience. Throughout the United States, as is well known, the distinction between solicitor and barrister has been abolished. Once admitted to the bar, a lawyer can practice at any branch of legal work, and a young counsellor usually conducts his whole case from the first interview with the client to the final signing of judgment. Now it may well be that this system makes litigation cheaper — and the great volume of business in the courts appears to show that there is more court work proportionally in New York than in London — but it certainly makes it slower, and it is costly therefore from the point of view of expenditure on the judiciary. The "omnibus" lawyer — if one may use the term — does not put his argument as briefly, does not narrow down the issue of fact so concisely, nor appreciate when the judge has taken his point as readily, as the English barrister. As a judge of the Supreme Court said to the writer, "Our experienced lawyers are often half-trained. Your practising barristers are fully trained." The demand of the people may not be the best criterion in such matters, and the distinction of functions between the two branches in England may appear to the client in some cases unreasonable and irksome, but, looking to the broad results, justifies itself by preserving a class of pleaders and advocates which is perhaps higher in standing and ability than the same class in any other country.

Besides the delay caused by the prolixity of the lawyers, the arrangement of business in the courts is calculated to increase the arrears and reduce the time available for hearing cases. Every day there is published in most of the Superior Courts a calendar containing a great number of causes, varying between twenty and fifty; and before the judge proceeds to the trial of actions this calendar is called and counsel may appear for either party to show cause why the case should be taken out of the list. They are fertile, of course, in producing reasons for postponement, and not only is an hour of the court's time lost in settling the applications, but the list is in a condition of constant disorganization; cases which have been held over are brought in, and cases some way down the list are suddenly advanced. Here we have bitter complaints because on the King's Bench side there is often an interval of a year between entering the case for trial and the actual hearing. In New York an interval of three years is not rare, though the main cause for the delay is not the congestion of business, but the machinations of parties and their counsel. At the same time a cause can nearly always be carried through quickly by being entered in what is called the "Special Term" list.

So much for the cumbrousness of the American procedure. There are upon the other side of the account certain features which merit our favorable notice. Some time is saved, and a greater measure of accuracy is secured, by the rule that in every civil as well as in every criminal case the evidence is taken down in shorthand by a stenographer, and read out to the witness at the close of the examination, so that its correctness is ascertained. It may be that the judge does not grasp the salient facts as clearly by this method as if he were to make his own abstract of the witnesses' statements, but the taking of evidence is certainly expedited. Another difference in procedure, which has much to recommend it, is that in every appeal the statement

of the main facts and the legal arguments, statutes, and authorities upon which each of the parties will respectively rely are embodied in a printed "brief," which is laid before the court. In other words, what is done here in appeals to the supreme appellate tribunals is done in America in the case of all applications to revise the decision of a lower court, and it is, in fact, done more thoroughly, inasmuch as the brief deals as fully with the legal issues as with the issues of fact.

There are two other noteworthy points about the American legal system which, though not concerned with the administration of civil law, may be of interest to English lawyers. In the first place, there is no imprisonment for debt except where there has been contempt of court by failure to pay a fine or penalty. The practice differs in various States, but the rule is absolute throughout the State of New York, and it is not found to work adversely to the trading classes. Secondly, there is an institution known as the Night Court, which provides a more summary jurisdiction than has yet been called for in this country. One of the judges of the Criminal Court sits each night from about nine P. M. till midnight or later to dispose of charges against persons who have just been arrested in the streets. He may acquit them, admit them to bail, sentence them summarily in certain cases, or commit them to prison. The court was instituted recently in New York, partly because the prison accommodation in the city is inadequate, partly because a serious abuse of usurious bondsmen had sprung up; but it is typical of the innovating and progressive spirit which marks the administration of law as much as every other branch of public life in America. There is a great desire to fit the courts to the changing needs of the people; and their advantages, as well as defects, are due to their democratization, which has, on the one hand, induced the breaking down of a standard and tradition among the bar, and, on the other, has fostered greater adaptability both in the substantive and adjective parts of law to new developments.

The lesson may be drawn from American experience that any change in the functions of the two branches of the profession should be introduced with the greatest caution and circumspection, because upon the reliability and high standing and impersonality of the advocate depends in large measure the good administration of the law.

Cases of Interest.

VALIDITY OF INHERITANCE TAX EXEMPTING STEPCHILDREN. — In Commonwealth *v.* Randall, 73 Atl. Rep. 1109, the Pennsylvania Supreme Court holds that the inheritance tax statute of that State, exempting stepchildren from a collateral tax on estates left by their step-parents, is not in violation of the constitutional requirement as to uniformity of taxation, as the distinction made in favor of stepchildren has some basis in the marital and family relation, and falls within the classifying power of the legislature.

SUIT AGAINST STATE PENITENTIARY BOARD AS SUIT AGAINST STATE. — In Pitcock *v.* State, 121 S. W. 742, the Arkansas Supreme Court holds that a suit against the commissioners of the State penitentiary to restrain them from violating a contract for convict labor is a suit against the State prohibited by the constitution, inasmuch as the board is created by statute as the agent of the State to provide for working the convicts. The court also holds that a person contracting with the State acquires no vested right thereby and cannot complain that the court determines that his suit on the contract is against the State, although in so deciding the court overrules a prior decision authorizing a suit on the same contract against the penitentiary commissioners. Battle, J., dissents.

RECEIVERSHIP OF SOLVENT CORPORATION. — In Boothe *v.* Summit Coal Mining Co., 104 Pac. Rep. 207, the Supreme Court of Washington ordered the appointment of a receiver for a solvent corporation. The owner of one-half the stock gained possession of the corporation and all its affairs through his subservient trustees, and excluded the owner of the other half of the stock from any participation in the management of the company. He refused the other owner an inspection of the books. Because of a deadlock no new trustees could be elected, and the bitter personal differences between the two stockholders seemed to make any adjustment of the matter impossible. The court held that the circumstances were such as to justify the appointment of a receiver, although it is the general policy of courts of equity not to appoint a receiver of a solvent corporation.

VALIDITY OF DISTRIBUTION OF ESTATE ACCORDING TO INDIAN CUSTOM. — In Hatch *v.* Luckman, 118 N. Y. Supp. 689, Supreme Court Justice Wheeler holds that the distribution of the estate of a deceased Indian on the Tonawanda reservation in the State of New York is subject to the laws of the State, and that an immemorial custom or ceremony among the Tonawanda Indians, known as the Tenth Day or Indian Dead Feast, in pursuance of which the relatives and members of the clan of the deceased assembled at his last place of residence on the tenth day after his death and agreed upon a distribution of his property, ignoring the rights of his natural heir, is of no avail to defeat the rights of such heir. It was contended that this feast constituted an Indian probate court and that the courts of the State were bound to respect the action thus taken, but the court decides that no sanction for the existence of such an alleged court is to be found in the constitution or statutes of the State.

LIABILITY FOR FRIGHTENING HORSE BY SEARCHLIGHT FROM AMUSEMENT PARK.—In Maiss *v.* Metropolitan Amusement Asso., 89 N. E. Rep. 268, the Illinois Supreme Court had before it an appeal from a judgment for damages caused by the frightening of the plaintiff's horse by the defendant's searchlight. It appeared that the defendant was conducting an amusement park in the city of Chicago, and in connection therewith operated an electric searchlight placed on a tower and so constructed and arranged that the light could be thrown by the operator in a horizontal or vertical path, and that the plaintiff, after dark, was driving a quiet and gentle horse in the vicinity of the amusement park when the searchlight was thrown down in the horse's face, frightening it so that it ran away and threw the plaintiff out, injuring him and damaging the buggy. It was held that the trial court properly refused to direct a verdict in favor of the defendant moved for on the ground that no negligence was proven, and the judgment was affirmed.

INJUNCTION AGAINST SUNDAY BASEBALL. — In McMillan *v.* Kuehule, 73 Atl. Rep. 1054, the New Jersey Court of Chancery, while disclaiming any power on its part to enforce by injunction the observance of the Sunday laws, so called, enjoined as a nuisance the playing of Sunday games at a certain park, upon the affidavits of six persons residing in the neighborhood where the games were played, that they were disturbed and annoyed by the crowd of spectators going to and from the games and by the noises made during the playing of the games. One affiant said that quite a large number of boys in his Sunday school absented themselves in order to attend the games. Forty persons situated similarly to the foregoing six swore that the noises of the games were quite inappreciable and not at all disturbing. The court declared that the case did not depend upon the preponderance of the evidence as to the extent and character of the noises so much as upon the question as to whether

the complaining affiants were actually disturbed, and in the absence of proof that the complainants and their witnesses were morbidly sensitive, the court concluded that a nuisance was established which should be enjoined.

VALIDITY OF INDETERMINATE SENTENCE STATUTE. — In State *v.* Duff, 122 N. W. Rep. 829, the Supreme Court of Iowa holds that the "indeterminate sentence" statute of that State, providing that a person convicted of crime shall be sentenced to the penitentiary for a period not exceeding the maximum statutory penalty for the crime (*i. e.*, making the imposition of the maximum term obligatory on the courts) and creating a board of parol with power to lessen the term of a person sentenced to imprisonment by a parol under the term of the statute, is not invalid as taking away the power vested by the constitution in the courts, or as violating any constitutional right of the accused. In this case the defendant argued that the statute under which he was sentenced was invalid because it not only forced the trial judge to pass sentence for the maximum term, but forced him to hand the defendant over to the board of parol, composed of three men, who might deprive him of his liberty and citizenship for many years. This contention the court refutes by showing that the legislature has the right to fix a definite punishment for any crime, without leaving a discretion to the court, and that the defendant is in no position to complain of a reduction of his term by the board of parol.

POWER OF STATE TO PROHIBIT EXPORTATION OF NATURAL GAS BY PIPE LINES. — In Kansas Natural Gas Co. *v.* Haskell, 172 Fed. Rep. 545, the United States Circuit Court for the Eastern District of Oklahoma holds that the Oklahoma statute providing that no corporation organized for the purpose of or engaged in the transportation of natural gas within the State shall be granted a charter or right of eminent domain, or right to use the highways of the State, unless it shall be expressly stipulated in its charter that it shall only transport or transmit gas through the pipe lines to points within the State and that it shall not connect with or deliver gas to any individual or corporation engaged in transporting or furnishing natural gas to points outside of the State, is invalid as an attempt to interfere with interstate commerce and as depriving the owners of gas wells within the State of their property without just compensation. It is thus held that a State does not possess the power derivable from any source, to prohibit the transportation of natural gas in interstate commerce, or persons from engaging in such enterprise in a lawful manner, although the object of the State in imposing the prohibition is to conserve the natural gas for the use and benefit of its own people and the upbuilding of manufacturing and commercial enterprises in the State, and thus increase the taxable wealth and prosperity of the State.

DEGREE OF CARE REQUIRED OF DRIVER OF AUTOMOBILE. — In Weil *v.* Krentzer, 121 S. W. Rep. 471, the Kentucky Court of Appeals affirms a judgment against the owner of an automobile for injuries inflicted upon a pedestrian under the following circumstances: The defendant, while driving his machine along the streets of a city, saw that the plaintiff, a pedestrian in the street, was confused as to which way the automobile was going to turn after having been warned of its approach, and both the pedestrian and the machine turned several times, each in the same direction as the other, to avoid the collision. It is held that the driver had no right to keep zigzagging in the street in view of the evident confusion of the pedestrian and the danger of collision, but should have stopped. The court says: "When one comes through the highways of a city with a machine of such deadly force as an automobile, it is incumbent upon the driver to use great care that it be not driven against or over pedestrians. An automobile is nearly as deadly as, and much more dangerous than, a street car or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train."

VALIDITY OF RAILROAD COMMISSION RULE REQUIRING RAILROADS TO FURNISH CARS PROMPTLY ON REQUEST. — In Southern Ry. Co. *v.* Melton, 65 S. E. Rep. 665, the Georgia Supreme Court passed upon the validity of the rule of the State Railroad Commission, adopted under authority of a statute, requiring railroad companies to furnish cars on the request of a shipper. The rule provides that "when a shipper files with a railroad company written application for a car or cars, stating therein the character of the freight to be shipped, and its destination, such railroad company shall furnish same within four days (Sundays and legal holidays excepted) from seven o'clock A. M. of the day following the receipt of such application. For a violation of this rule the railroad company at fault shall, within thirty days after demand in writing is made therefor, pay to the shipper so offended the sum of one dollar per car per day, or fraction of a day, after the expiration of free time, during which such violation continues." The rule was attacked as covering a strictly legislative subject and as imposing a burden on interstate commerce. The court answers these contentions and holds that the rule does not violate any constitutional provision. Chief Justice Fish dissents on the ground that the legislature cannot delegate to the commission power to make regulations for the government of a particular subject and also authorize the commission itself to prescribe a penalty or pecuniary liability for the violation of such regulations.

PRIORITIES AS BETWEEN ORIGINAL AND NEW CREDITORS OF INSOLVENT CORPORATIONS SURRENDERED TO AND MANAGED BY ORIGINAL CREDITORS. — In Davis *v.* Iowa Fuel Co., 122 N. W. Rep. 815, the Iowa Supreme Court decided a case which is said to be unique and without precedent. The facts were these: A corporation engaged in the retail coal business and indebted in an amount largely in excess of its assets surrendered all its property to its creditors, who thereupon undertook to manage the business through a trustee who was a principal stockholder and former manager of the corporation. The creditors stipulated against personal liability. The trustee was required to give bond and was directly accountable to them. The enterprise thus undertaken by the creditors did not prove successful, new debts were incurred, and a receiver was finally appointed for the corporation, who converted its assets into money for distribution to creditors. The original creditors contended that they should share equally with the new creditors, and argued that as the business, since they assumed control, continued to be conducted by the former manager of the corporation without substantial change the new creditors had extended credit to the corporation just as the original creditors had done and should have no preference. It was further argued that the original creditors simply forbore litigation, and that they should not be penalized therefor. The court held that the conduct of the original creditors in putting up the property of the corporation as capital for its further operation and sending their trustee into the commercial world to contract debts upon the faith of it, entitled the new creditors to preference.

LIABILITY OF PROPRIETOR OF BILLIARD ROOM TO CUSTOMER INJURED BY VIOLENCE OF THIRD PERSON. — In Moone *v.* Smith, 65 S. E. Rep. 712, the Court of Appeals of Georgia reversed the judgment of the trial court dismissing the petition of the plaintiff who sought to recover damages from the defendant for injuries received in the latter's billiard and pool room by the violent conduct of other persons, also patrons of the defendant's

place. It appeared that the plaintiff was engaged in playing a game of pool and while so engaged and conducting himself in a proper and orderly manner, a quarrel arose between four or five men who were intoxicated. The quarrel began at some distance from where the plaintiff was playing, and continued for some ten or fifteen minutes, creating a noise and disturbance noticeable in all parts of the room, but neither the proprietor nor his employees made any effort to quell the disorder by personal interference or by calling the police. The fighters eventually precipitated themselves to the place where the plaintiff was standing, and in the mêlée injured him. It was held that the negligence of the defendant was a question of fact for the jury, and that the plaintiff was not required as a matter of law to seek safety by leaving the premises. The court said: "The duty assumed by the owner of a place of amusement or recreation where the public are invited for his profit and their pleasure is analogous to that which the law imposes upon carriers of passengers, differing only in the standard of care required. In the latter, the standard is extraordinary care, and in the former, ordinary care."

New Books.

DRAWING WILLS AND SETTLING ESTATES.

Practical Suggestions for Drawing Wills and the Settlement of Estates in Pennsylvania. By John Marshall Gest, of the Philadelphia Bar. 8vo, pp. xx + 152. Philadelphia: T. & J. W. Johnson Co., 1909.

Although, as indicated by the title, this book does not purport to be written for the use of lawyers outside of Pennsylvania, it need not have been limited in this manner. While it pays particular attention to Pennsylvania law, it contains a large amount of matter, especially in Part I., relating to the drawing of wills, that is as applicable and valuable in one State as in another; and though it is made up of a series of lectures delivered to students in the law department of the University of Pennsylvania, the mature practitioner will find in its pages many suggestions worthy of his attention.

Of course the majority of the rules and suggestions laid down for the drawing of wills have been stated in one form or another by many preceding writers; but Mr. Gest has formulated them in a very concise though comprehensive manner, so that they are comprised within some fifty pages of the book, which it would not hurt the average lawyer to glance over just prior to drafting a will for a client. A few of these suggestions may be briefly mentioned.

Counsel called upon to draw a will is cautioned in advising his client to be careful not to incur the risk of being accused of having made the will himself, though he should be well informed as to all the conditions which surround the testator, and, to use an expression of Lord Justice James, in Boyes *v.* Cook, 14 Ch. Div. 56, should "place himself in his client's armchair," considering also the contemplated will from the standpoint of the testator's family.

In taking instructions for the will, Mr. Gest favors the plan of having the testator write a preliminary draft himself, as a basis to work on. This is not only of assistance to counsel, but may prove valuable as evidence in case the will is ever contested.

Counsel should, of course, satisfy himself as to his client's testamentary capacity, and Mr. Gest suggests that if the testator is ill, and under the care of a physician, it is sometimes advisable to consult with the doctor and have him and the nurse act as witnesses — bearing in mind, however, that their opinions as to testamentary capacity are by no means final, and should be received with a degree of caution.

An excellent piece of advice is never to write a will for a stranger, but always to require an introduction or in some way to be thoroughly satisfied of the identity of the person whose will the attorney assumes to draw.

The above are only samples of the many hints and recommendations that lawyers in any State will find useful. Mr. Gest discusses with sufficient fullness for the purposes of his book the formal parts of wills generally, the use and effect of codicils (which he considers convenient for provisions which it may be desirable to change, such as numerous bequests of personal property and the appointment of executors), trusts of various kinds, the necessity of writing, the rule against perpetuities, and many other matters. His remarks on the province of the attorney in regard to advising his client as to bequests to charities and the exclusion of members of his family from sharing in his estate are particularly well considered.

By a quiet humor, not usual in law books, Mr. Gest has succeeded in investing an ordinarily dry subject with a marked degree of human interest. In this respect his book reminds us strongly of what is perhaps the best short treatise on parliamentary procedure ever published — Congressman Frank W. Hackett's "The Gavel and The Mace." In speaking of the desirability of making wills deliberately, with sufficient time for consultation and revision, the author says that "a deathbed will is as sorry a substitute for a carefully prepared instrument as a deathbed repentance is for a well-ordered life."

The old practice of specifically bequeathing the testator's soul to the Almighty is discouraged, partly because "there is always some danger that the bequest may not be accepted, and besides the State might endeavor to collect the collateral inheritance tax, although it would be so difficult to appraise the value in many cases that the maxim *de minimis* would apply."

A will patently drafted by an illiterate testator with the aid of a form-book which he did not in the least understand, and replete with pious ejaculations and technical phrases, Mr. Gest says, "can hardly be said to be without form, but the Supreme Court of Pennsylvania said it was void."

It is recommended that the testator sign each page of the will, particularly if the instrument be typewritten, not only because this is a safeguard against fraud, but because "it generally pleases the testator to write his name so often." And the use of a red wafer for a seal is advised, since "it does no harm, is inexpensive, and pleases the æsthetic eye."

In regard to the settlement of estates, Mr. Gest opines that the most effectual method is to run away with all the assets. This plan, he says, "possesses not only the obvious merits of speed and simplicity, but also relieves the courts of the labor of construing the will, and moreover produces in the bereaved family, however discordant they may have been, a feeling of singular harmony." He suggests, however, that should this method be pursued, the extradition treaties should first be carefully examined.

Part II. of the work, devoted to the settlement of estates, pertains more particularly to Pennsylvania than does Part I., but in this division, also, will be found no small amount of matter of general application.

The book contains a table of cases, most of which, naturally, are of Pennsylvania, though a good many English cases appear and a few from other jurisdictions in the United States; a table of Pennsylvania statutes, and a fairly good index.

H. H V. D.

THE ENGLISH ENCYCLOPÆDIA OF LAW.

The Laws of England: Being a Complete Statement of the Whole Law of England. By the Right Hon. the Earl of Halsbury and other lawyers. Vol. VIII., "Copyholds" to "County Courts," pp. cxxviii + 693 and Index. Vol.

IX., "Courts" to "Crown Lands," pp. clxxx +794 and Index. Royal 8vo. London: Butterworth & Co., 1909. Agents for the United States, Lawyers' Co-operative Publishing Co., Rochester, N. Y., and Cromarty Law Book Co., Philadelphia, Pa.

The two volumes before us comprise the titles "Copyholds," "Copyright and Literary Property," "Coroners," "Corporations," "County Courts," "Courts," and "Criminal Law and Procedure," besides numerous cross-references. It is a little difficult for a lawyer accustomed to American methods of classification to discern exactly what principles of inclusion and exclusion are adopted to determine the scope of the respective titles. For instance, the article on "Corporations" purports to deal with the general principles of law applicable to all corporations and leaves to specific titles the treatment of particular kinds of corporate bodies, such as banking companies, gas companies, insurance companies, municipal corporations, etc. On the other hand, the title "Criminal Law and Procedure," which might be expected to follow a similar method, treats elaborately a long list of specific crimes, following in this respect the method of the best-known of the English digests. The volumes are on a par with their predecessors in regard to editorial work and in mechanical make-up, which is of the highest type of modern bookmaking. Volume VIII. states the law as of June 2, 1909, while Vol. IX. is brought down to Aug. 10, 1909.

News of the Profession.

THE OREGON STATE BAR ASSOCIATION held its annual meeting in Portland on November 16 and 17. Details of the meeting will be given in this column next month.

DEATH OF EX-JUDGE HINTON. — Hon. Drury A. Hinton, associate justice of the Virginia Supreme Court from 1882 to 1894, died at his home in Petersburg, Va., October 19.

JUDGE GILDERSLEEVE RESIGNS. — Hon. Henry A. Gildersleeve, of the New York Supreme Court, has tendered his resignation to Governor Hughes to take effect November 30. His term would expire on December 31, 1910.

UNIFORM LEGISLATION CONFERENCE. — The conference on uniform legislation will be held in Washington, D. C., on January 5 to 7, under the auspices of the National Civic Federation. President Taft will make the opening address.

EX-FEDERAL JUDGE DIES IN PENNSYLVANIA. — Hon. William Butler, former United States district judge for eastern Pennsylvania, died at his home in West Chester on November 2, aged eighty-six. He was appointed to the federal bench in 1879, and held the position for twenty years.

YALE LAW SCHOOL'S DECREASED ATTENDANCE. — The number of students enrolled in the Yale Law School this year is 350 as against 438 a year ago. The decrease is largely if not entirely due to the more rigid entrance requirements put in force this year.

OLD INDIANA LAWYER DEAD. — Hon. David D. Evans, formerly county judge of Vermilion county, Ill., and the oldest member of the Danville bar, died in that place on October 13, aged eighty-one. He was in active practice until a few weeks before his death.

MUST STUDY THREE YEARS IN MASSACHUSETTS. — The Massachusetts board of examiners for admission to the bar has adopted a rule that after Aug. 1, 1910, no candidate shall be examined for admission who has not studied law for three full years or their equivalent.

CANADIAN JUDGE DIES. — Judge Mailhot, of the Superior Court of Quebec, died at St. Pierre les Becquets, Que., on October 21. Judge Mailhot was called to the bar of Lower Canada in 1858 and was made a Q. C. in 1888, in which year he was also elevated to the bench.

FEDERAL ATTORNEY BLODGETT RESIGNS. — Harry W. Blodgett, United States district attorney for the eastern district of Missouri, has tendered his resignation, to take effect December 1. Mr. Blodgett will form a partnership with Charles W. Bates, former city counsellor of St. Louis.

INDIANA'S OLDEST JUDGE RETIRES. — Circuit Judge Oscar M. Welborn, of Princeton, Ind., the oldest in point of service of the Indiana judges, retired from the bench on October 26 after a continuous service of thirty-six years and seven months. His successor is Herdis F. Clements, of Mount Vernon.

DISTINGUISHED VIRGINIAN DEAD. — Francis Rives Lassiter, for several terms representative in Congress from the fourth Virginia district and one of the most widely known lawyers in the State, died suddenly in Petersburg, Va., on October 31, aged forty-three. He was a graduate of the University of Virginia law school.

APPOINTED TO ONTARIO HIGH COURT. — Hon. R. F. Sutherland, of Windsor, member of the Canadian House of Commons for North Essex and former speaker of the House, has been appointed a judge of the Ontario High Court, taking the place of Justice Auglin, who was elevated to the Supreme Court bench several months ago.

CALIFORNIA STATE BAR ASSOCIATION ORGANIZED. — The movement started by the San Francisco Bar Association to organize a State-wide association resulted in a convention being held in San Francisco on November 10 for the purpose of forming such an organization. Delegates from all parts of the State were in attendance, and the new association was successfully launched. In the evening a banquet was given by the San Francisco Bar Association at the Hotel St. Francis in honor of the visiting delegates.

TO INVESTIGATE CRIMINAL LAW IN EUROPE. — Hon. John D. Lawson, dean of the University of Missouri law school, has been appointed by the American Institute of Criminal Law and Criminology to make an investigation of the administration of criminal law in Europe and will start on his journey about the end of December to remain away until September, 1910. During his absence E. W. Hinton will act as dean of the law school.

BANQUET TO CHIEF JUSTICE MITCHELL. — A farewell banquet was tendered Chief Justice James Tyndale Mitchell, of the Pennsylvania Supreme Court, at the Fort Pitt Hotel, Pittsburg, on October 28 by the Allegheny County Bar Association. On January 1 next Chief Justice Mitchell will retire from the bench after a service of twenty-one years. David T. Watson, of Pittsburg, acted as toastmaster, and among those who responded to toasts were Chief Justice Mitchell, Associate Justice Fell, George B. Gordon, and Woods N. Carr.

RUSSIAN LAWYER SENT TO PRISON. — On November 10 a leading St. Petersburg lawyer named Gillerson was sentenced to a year in prison for alleged inflammatory language used by him at the trial in Bialistok of participants in the Jewish massacre in which seventy-three were killed and eighty-two wounded. Gillerson was counsel for relatives and friends of the victims, and it was charged against him that he irrelevantly introduced arguments inciting workingmen against the government.

DEAN OF NORTH CAROLINA LAW SCHOOL DEAD. — Hon. James Cameron McRae, dean of the University of North Carolina law school and formerly a justice of the North Carolina Su-

preme Court, died at Chapel Hill, N. C., on October 19. Judge McRae was in his seventy-third year. He was elected a judge of the Superior Court in 1882, and ten years later was promoted to the bench of the Supreme Court. Since his retirement from the bench he had been a professor in the law school.

BANQUET TO ILLINOIS SUPREME COURT. — On the evening of October 30, at the Hotel La Salle in Chicago, the Illinois State Bar Association gave a banquet in honor of the justices of the State Supreme Court. Several hundred lawyers and judges from all parts of the State were in attendance, and the banquet was a brilliant success in every respect. President Edgar A. Bancroft acted as toastmaster. Toasts were responded to by Mr. Chief Justice Farmer, Mr. Justice Cartwright, Mr. Justice Cooke, Judge Baker, formerly of the Indiana Supreme Court and now of the United States Circuit Court of Appeals, and Mr. William J. Calhoun.

INTERNATIONAL REGULATIONS FOR AUTOMOBILES. — The rapid growth of the automobile industry and the ever-widening influence of the self-propelled vehicles on modern civilization make it likely that before long international law will have to concern itself with the automobile. In fact a convention called by the French government to consider the subject was held in Paris during October and drew up a convention in nine parts, prescribing the proper examination and certification of cars and their drivers, the placing of special identification numbers on cars when in foreign countries, the carriage of warning signals, and the position of sign posts.

HARVARD LAW SCHOOL TO LOSE PROF. SMITH. — The Harvard University office announces the resignation of Prof. Jeremiah Smith, Story professor of law, to take effect Sept. 1, 1910. Prof. Smith graduated from Harvard College in 1856, and received his master's degree in 1859. In 1883 he was given the honorary degree of LL.D. by Dartmouth College. He was associate justice of the Supreme Court of New Hampshire from 1867 to 1874, and has been Story professor of law at the Harvard Law School since 1890. At the last meeting of the corporation Prof. Smith was appointed Story professor of law, emeritus.

DEATH OF SENATOR LINDSAY. — Hon. William Lindsay, ex-Chief Justice of the Kentucky Court of Appeals and former United States senator for Kentucky, died at his home in Frankfort on October 15, aged seventy-four. After serving through the Civil War in the Confederate army he resumed the practice of law in Kentucky, and in 1867 was elected to the State legislature. From 1870 to 1878 he served on the bench of the Kentucky Court of Appeals, the last two years as chief justice of the court. In 1893 he was appointed United States senator to complete the unexpired term of John G. Carlisle, and was subsequently elected to the office for a full term which expired in 1901. Subsequently he practiced law in New York, being senior member of the firm of Lindsay, Kremer, Kalish & Palmer.

PUTNAM SUCCEEDS GAYNOR — THOMAS MOVES UP. — The vacancy in the New York Supreme Court bench for the second judicial district created by the resignation of Justice William J. Gaynor, mayor-elect of New York city, was filled on November 8 by the appointment of Harrington Putnam, of Brooklyn. The new justice is fifty-eight years old. He was graduated from Colby College and the Columbia Law School, and for a time lectured in the latter school. He is a member of the well-known law firm of Wing, Putnam & Burlingham, and has long been one of New York's distinguished lawyers, especially in commercial and admiralty law. At the same time that he appointed Mr. Putnam, Governor Hughes announced the appointment of Justice Edward B. Thomas, of Brooklyn, to be an associate justice of the Appellate Division of that department to take Justice Gaynor's place in the higher court.

VERMONT STATE BAR ASSOCIATION. — The thirty-second annual meeting of the Vermont State Bar Association was held in Montpelier on November 2 with President James K. Batchelder, of Arlington, in the chair. The president delivered the annual address, taking for his subject "The Law's Delay," and F. C. Williams, of Newport, read a memorial sketch of John B. Peckett, of Bradford. The association adopted the code of ethics recommended by the American Bar Association with the exception of the portion relating to contingent fees, which matter was referred to a committee with instructions to report on it at the next meeting. In the evening the annual banquet was held with Mr. J. Archambault, of Montreal, as the guest of honor. The retiring president acted as toastmaster, and among those who responded to toasts were Chief Judge Rowell and Judge George M. Powers, of the State Supreme Court; Judge F. M. Butler, of the Superior Court; J. Archambault, of Montreal; Senator E. W. Gibson and C. C. Fitts, both of Brattleboro; Warren R. Austin, of St. Albans; United States District Attorney Alexander Dunnett and Frederick G. Fleetwood, of Morrisville. The following officers were elected for the ensuing year: President, C. G. Austin, of St. Albans; vice-presidents, C. C. Fitts, of Brattleboro, Elisha May of St. Johnsbury, and E. C. Mower, of Burlington; secretary, John H. Mimms, of St. Albans; treasurer, E. M. Harvey, of Montpelier.

English Notes.

NO MORE KISSING THE BOOK. — At last Parliament has passed the Oaths Bill, abolishing the filthy practice of "kissing the book," and substituting the taking of the oath with uplifted hand. The only objection that can be raised to the change is that it eliminates a very fruitful topic for editorial comment and letters to the papers.

A FRUITLESS VICTORY. — Sir Sherston Baker, judge of the Lincolnshire County Court, recently rendered a judgment in favor of a plaintiff which must have been highly satisfactory to the defendant. The action was brought by a money-lender to recover a balance due on a loan. The defendant, a dairyman, had borrowed $200, for which he gave the plaintiff notes amounting to $310. Of this amount he had already paid $220. The judge ordered him to pay the balance in instalments of one penny a month, at which rate it will take 360 years to liquidate the debt.

WARNING MOTORISTS OF POLICE TRAP. — In the recent case of Betts *v.* Stevens (noted in the *Law Journal* for October 23, at page 629), the King's Bench Division held that a person who warned automobilists of a trap set by the police was guilty of obstructing the officers in the execution of their duty, it being shown that some of the cars warned were traveling at an illegal speed. The court distinguished this case from Bastable *v.* Little, L. R. (1907) 1 K. B. 59, wherein a contrary view was taken, on the ground that in the latter case there had been no showing that any of the cars warned were traveling at an illegal rate of speed.

AMERICAN LAWYER APPEARS IN ENGLISH COURT. — On a prosecution recently before the Kingston justices for driving an automobile too fast, an American lawyer who was in the car asked permission to appear for the defense. Although it was contrary to practice to allow any but English counsel and solicitors to appear, the justices permitted the American lawyer to cross-examine for the defendant, and he also gave evidence. The *Law Journal* in commenting on the occurrence remarked that "the innovation by the bench was not due to courtesy, or to curiosity as to transatlantic cross-examination, and the case may perhaps be regarded as too exceptional to call for serious attention from the Law Society or the Bar Council."

VETERAN LAWYERS. — The oldest solicitor in England is Mr. Richard Peter, of Launceston, who recently celebrated his hundredth birthday. Mr. Peter, however, is not, so far as the date of admission is concerned, the senior member of his branch of the profession, for he was admitted in 1838, whereas Mr. F. H. Janson, whose name still appears in the "Law List" as senior member of a firm of London solicitors, was admitted in 1835. Mr. William Curtis, a Plymouth solicitor, is still in practice at the age of ninety-two. But the "father" of the profession is a barrister, Mr. Hake, who was called to the bar in 1835, some five months before Mr. Janson was admitted as a solicitor.

DIVORCE AND IMMORALITY. — Those persons who harbor the conviction that immorality and divorce necessarily go hand in hand and that obstacles in the way of obtaining divorces make for morality may be surprised to know that the present rigidity of the divorce law and procedure in England is held responsible for an increasing laxity of morals among the mass of the population. Over there divorce *a vinculo* is such an expensive luxury as to be out of the reach of most people, and the usual substitute for it is a "separation order" — amounting practically to a divorce from bed and board — which is granted by lay justices. These orders are now being granted at the rate of more than 7,000 a year, and the results appear to be disquieting to the judicious, who are advocating an extension to the county courts of jurisdiction in divorce as a step toward the elevation of the public morals.

SHOULD BARRISTERS AND SOLICITORS BE FUSED? — The advisability of amalgamating the two branches of the legal profession appears to be receiving serious consideration in England at present. While there are some barristers who advocate the adoption of the American system, the innovation finds the bulk of its advocates among the solicitors, or "inferior" branch of the profession, and the majority of the barristers and judges can be counted on to oppose it with vigor, if not with heat. Debate on the question has been stirred up recently by a proposal to extend the jurisdiction of the County Courts, the vexed point being whether solicitors shall have the "right of audience" under the extended jurisdiction. However, it is entirely too early to grow interested in the matter, for many years of acrimonious discussion must always precede any such radical change in England.

CONVICTION DEPENDING ON A COMMA. — In the case of Rex *v.* Conolly, recently before the Court of Criminal Appeal, the correctness of the appellant's conviction and sentence to eighteen months' imprisonment with hard labor depended on whether or not there was a comma at a certain place in the statute under which he was convicted. As was to be expected, the court adopted the construction that entitled the prisoner to serve his term — they do those things better over there. The statute in question imposes a penalty on any person who "shall knowingly and wilfully pretend or falsely assert in writing that any person has been hired," etc., and the question was whether the words "in writing" qualified "assert" only or also applied to "pretend." The statute was enacted in 1792, and therefore the authentic text is that on the Parliament Roll, which is not punctuated. However, the copy of the statute before the court contained a comma after "pretend," and so Mr. Conolly is now doing his time.

SOME QUEER RENTS. — A quaint custom was observed in the London law courts on October 25 when the City Secondary, on behalf of the Sheriffs of the City of London, attended before the King's Remembrancer, Master Mellor, to pay quit rents of two fagots and horseshoes and nails. The custom dates back to the time when one Walker Le Brun, a farrier, held a plot of land in the Strand, a stipulation of his tenure being that he should annually present the King with six horseshoes and sixty-one nails. The Strand forge was demolished in the reign of Richard II., and all traces of certain lands known as the Moors, in Shropshire, upon which two fagots, severed by a sharp hatchet and afterward by a blunt instrument, had to be presented, have also disappeared. As the time went on the rendering of the tribute devolved upon the Sheriffs of the City of London. Hence it was that the City Secondary attended before the King's Remembrancer and duly presented two fagots, half a dozen horseshoes, and sixty-one nails as prescribed. It did not detract from the interest in the occasion to know that the horseshoes were the identical ones that had been presented for upward of five hundred years.

There have been many curious forms of rent quittance, some of which still survive. In the thirteenth century one Solomon Attifeld got a grant of lands at Kepperton and Atterton, near Dover, on condition "that so often as the King should be pleased to cross the sea, the said Solomon or his heirs should be obliged to go with him to hold his Majesty's head if he should be seasick." From the national records it would appear that this office of head holding was last performed in the reign of Edward I., but Hasted, the historian of Kent, says that in the reign of Henry VI., John Baker held the lands of Coperland and Atterton, in the parish of River, Kent, on the same service.

The Duke of Atholl holds part of his lands conditionally on his presenting a white rose to his sovereign when honored with a visit. The late Queen Victoria and Prince Albert once were his guests at a time when these flowers were out of season, and the Duke had much difficulty in obtaining two roses for the occasion.

The rent payable by the Munros of Foulis is a snowball, which must be presented at any time of the year upon demand. This condition is not so hard to fulfil as would appear, inasmuch as Ben Wyvis, upon which there is never any lack of snow, is situated on the Foulis lands.

On January 18 every year, the anniversary of the battle of Waterloo, the Duke of Wellington is bound to present to the sovereign a small flag, which is the annual rent in "petit sargeanty" by which the ' tate of Strathfieldsaye is held of the Crown. The flag must be a miniature tricolor or eagle of the Napoleonic army, fringed with gold, with a gilded eagle on the head of the staff and the number of the year embroidered at the top corner of the flag near the eagle. The presentation ceremony takes place every year at Windsor Castle, where the flag is placed in the state guard room over the bust of the great Duke of Wellington and opposite to the bust of the great Duke of Marlborough, whose living representative must perform corresponding feudal service with a French Royalist flag on August 13, the anniversary of Blenheim. The strict legal theory is that if the Duke of Wellington fails to present the flag by twelve o'clock on Waterloo day he loses the estate.

There are many other tributes which the King could exact from his subjects. He could claim the herring pies which were formerly sent every year by the manor of Carlton in Norfolk. If he visits the town of Aylesbury, the inhabitants are bound to present him with three eels if it be winter, or two fat green geese if it be summer. It is the duty of the people of Chichester to provide the King with a false string for his crossbow whenever he visits them.

Certain lands in East Barnet are exempt from tithes, but Sir Thomas Lipton, who owns them, has to be ready when called upon to provide "fagots for the burning of heretics."

Among the concessions made by various English sovereigns to their subjects is the privilege by which a certain few are permitted to appear in the royal presence without doffing their headgear. Among the favored appear the De Courcys, the Forresters, and the masters of Trinity College, Cambridge.

Henry VIII. conferred this privilege rather frequently, and among others upon Walter Copinger of Vauxhall. "We be credibly informed," ran the document, "that our trusty and well beloved subject Walter Copinger is so diseased in his head that without his great danger he cannot be conveniently discovered of the same." Wherefore he was "licensed to use and wear his bonnet upon his said head as well in our presence as elsewhere at his liberty."

Obiter Dicta.

LUCK. — In Baron *v.* Berkley, Lutw. 674, Mr. Chief Justice Treby said: "Shall all the testator's debts be lost by the defendant's having the good fortune that his wife died?"

A HINT FOR WIVES. — In Holt *v.* Hopkins, 63 Misc. (N. Y.) 538, Judge Giegerich said: "These securities she intrusted to her husband to be put in the safe of the company where her husband was employed for safekeeping."

A HARSH MEASURE. — A notice of an ordinance passed once upon a time by the council of a Georgia town ran as follows: "Owners of hogs running at large in the city are hereby notified that on and after Feb. 10th they will be taken up and impounded unless they have rings in their noses."

BEHIND THE TIMES. — The Supreme Court of Austria has recently declared that cremation is opposed to Christian ideas, and that the burning of a human body is therefore an illegal act. "Earth to earth, ashes to ashes, dust to dust," says the burial service — but maybe they don't use that form over there. Anyhow, it's a silly decision.

BIBLIOMANIA. — In a recent hearing before Justice Truax, of the New York Supreme Court, relative to a subscription to an *edition de luxe* in twenty-two volumes at $300 a volume, a witness testified that he had paid $10,000 for an *edition de luxe* of another set of books. Justice Truax remarked: "Speaking unofficially, and not directing my remarks toward any special writer, author, or purchaser, I am of the opinion that any person who pays $10,000 or any such sum for one of these *de luxe* editions is an incompetent."

A BACKSLIDER. — In this column last month, under the caption "Moving Up," we commented with pleased surprise upon the moral progress of the world as indicated by the fact that a lawyer had abandoned his iniquitous profession and entered the ministry, while synchronously a clergyman had scaled another rung of the ethical ladder by becoming a street car conductor. With sorrow we have received the tidings that the latter soon found the atmosphere too rarefied and dropped back into his original vocation. However, the reformed lawyer was still hanging on at last accounts, which heartens us mightily.

MUST PRODUCE THE ESKIMOS. — Mr. Justice Jenks, of the New York Appellate Division, Second Department, is evidently from Missouri. In the recent case of Kerr *v.* Kerr, 118 N. Y. 801, he dissented from a holding that a ground for divorce was sufficiently established by showing that the defendant went to a hotel with a woman who was not his wife, registered under an assumed name as man and wife, went up with the lady in the elevator, and had not again appeared at midnight.

THE BEST THE CIRCUMSTANCES ALLOWED. — Some years ago three substantial citizens of Person county, N. C., having been appointed school committeemen of a certain district, met to be sworn in as the law required. There being no one else at hand authorized to administer the oath, one of the appointees, who was also a justice of the peace, undertook to perform that office for himself and his associates, which he did as follows: "You and each of us do solemnly swear that you will perform our duty as school committeemen of this district to the best of your knowledge and ability, so help us God."

TAUGHT THE JUDGE THE LAW. — The juvenile offenders law of Kansas makes no provision for trial by jury. Recently in Gray county a small boy was brought to trial under this statute, and after much argument between opposing counsel over the constitutionality of the act, the judge decided that the trial should be by jury, and accordingly six good men and true were duly sworn. The case was tried in the usual fashion, the jury were instructed, and retired to consider of their verdict. In due course of time the following verdict was brought in: "We, the jury in the above entitled cause, find that a verdict is beyond our jurisdiction under the law."

JUST AS HE EXPECTED. — Court had opened at one of the county seats of West Virginia when a member of the bar strolled in, took a seat, put his feet on a table, and lighted a cigar. The judge called the bailiff and directed him to see that the attorney took his feet down and stopped smoking. The officer obeyed his instructions, and was requested by the lawyer to tell his honor to "go to hell." Beckoning the bailiff to him the judge inquired what it was the attorney had said, and the bailiff, somewhat reluctantly, delivered the message: "He said for me to tell you to go to hell, your honor." "Yes," said the judge, thoughtfully, "I thought that was what the damned old scoundrel would say."

SUFFICIENCY. — The following legal notice recently posted by a citizen of Hillsboro, N. H., calls for no comment:

"My wife, Margrette Cilley, and her children have flew the coop, and did not ask anybody; left my bed and board. I shall pay no debts of her contracting after this day, and any man trusting her on my account will be the loss for you.

"No reward offered for their return.

"Wife wishes her mail addressed to Miss Margrette Clark, leave off the Cilley. Thus it will please her and I am satisfied.

"O, yes! I have been married plenty, now.

"Frank C. Cilley."

AN ACCOUNTING WANTED. — The following communication was recently received by a member of the Coushatta, La., bar:

Cept. 18 1909

St. john of the baptist Church whereas john Nailey have bin misaplying money blonging to this church For about 10 Months or Since cept. 13, 1908 and having borid $10.00 four year ago with ten per sent interest from time borid and two dollars took by him from the table when we wasnt looking and $4.75 Taken Up in the ralley Meeting about first sunday 1909, totle amount $36.75 thirty Six Dollars and 75 and whereas We the st john Baptist church have met august 25 1909 and in sed bisness meeting the Church ordered bro John nailey to turn over the Books and Papers of This body and whereas The said bro. John nailey faled to hear the Church so be It resolved that we turn over the matter to lawyer attorney mr Ed Carter to demand a Speady Settlement or we the church and the said lawyer attorney will take steps.

GO THOU AND DO LIKEWISE. — In the publisher's preface to Rolle's Abridgment, published in London in 1668, appear the following words relative to the learned Serjeant Rolle which deserve to be pondered over not only by all young men preparing for a career at the bar, but by many older ones who have already been careering there for some time:

"He did not undertake the practice of the law till he was sufficiently fitted for it, and then he fixed himself unto one court, namely the King's Bench, where was the greatest variety of business; by this means he grew master of the experience of that court, whereby his clients were never disappointed for want of his experience or attendance. He argued frequently

and pertinently; his arguments were fitted to prove and evince, not for ostentation; plain, yet learned; short (if the nature of the business permitted) yet perspicuous; his words few, but significant and weighty; his skill, judgment and advice in points of law and pleading was found excellent."

RAILROAD'S DUTY TO KNOW HABITS OF TIPPLING PEDESTRIANS. — In Frye *v.* St. Louis, etc., R. Co., 200 Mo. 377, Lamm, J., discussing the question whether the defendant railroad had sanctioned the use of its track by pedestrians, said: "The night use of this track by pedestrians was confined to two classes; first, the class to which the plaintiff belonged, to wit, the mill men living at Mill Springs and working at Leeper, some eight or ten in number; and the utmost the evidence tends to show is that when the days were short and the nights long these men used this track after dark to come and go, as plaintiff did. The other night class, as we construe the evidence, were those thirty denizens of Mill Springs, who, having dry whistles and parched gullets, wet them at the Leeper saloon, and who, like Tam O'Shanter, habitually lingered over the cup at a distance from home after dark in spite of the dangers besetting the road. Of this latter class, it may be said that one swallow does not make a summer, nor will the law make a public use of a railroad track out of many swallows (or swallowers) of the character under review. Indeed, we may ask whether the dry whistles after sundown in Mill Springs were notoriously so many and so dry — the nocturnal thirst there of such Gargantuan proportions — and the quality of liquor at the Leeper saloon was notoriously so fetching and seductive, that defendant's engineers (busy with the serious affairs of life) must be held to know thereof as a fact of current local history and govern themselves accordingly? We think not. Such matters do not usually proclaim themselves like an army with banners, or cry aloud from the housetops. In the absence of proof, we will presume that defendant's section men were not on duty after dark, and the case is barren of testimony bringing home notice to the employees, agents, and officers of defendant of such use of their track by night-brawlers and tipplers. Acquiescence, in the very nature of things, assumes a prior knowledge — the one cannot exist without the other."

Correspondence.

DIVORCE AND THE CATHOLIC CHURCH.

To the Editor of LAW NOTES:

SIR: I am one of your readers who has been enlightened and edified many times by LAW NOTES, and I venture into this inquiry, hoping that I may be enlightened again on the subject I have in mind. I see that the subject-matter is of interest to some of your readers, and consequently I am perhaps not alone in having this question on my mind.

In the November issue of LAW NOTES, under the heading "Papal Dispensations for Divorce," I find these words:

"The scholars acquainted with the history of the question know that the Roman Church does not countenance divorce as such, but they also know that for centuries it nullified marriages to an extent, and for reasons, which practically amounted to a limited cognizance of divorce."

I would like to know if you can refer me to any direct authority for this statement, outside of the commentaries of some particular men of more or less partisan bias. In other words, is there any place where these cases are reported, and if not, would you kindly refer me to such authorities which are non-partisan in their tendencies which you believe support the statement that the Roman Catholic Church for centuries nullified marriages to an extent and for reasons that practically amounted to a limited cognizance of divorce?

In basing this inquiry, I think it no more than just that you should confine the answer, as nearly as may be, to the Catholic idea of marriage, that is a consummated Christian marriage. As you probably know, the doctrine of the Church in question has always held, and, according to your article, still holds, that a consummated Christian marriage is indissoluble. That a marriage must be consummated to be indissoluble is manifest from reason as well as from ecclesiastical law, the basis of both being founded upon the words of St. Matthew, quoting Christ, "and they shall be in one flesh." Inquiry is limited to Christian marriage because that church draws a distinction between a Christian and an infidel marriage, and the discussion has given rise to what is called the Pauline Privilege (1 Cor. vii. 12–15), which has been exercised in some instances where polygamous countries have adopted Christian morals. So that, leaving out the discussion in regard to consummated and unconsummated marriages, and likewise the discussion as to the Pauline Privilege, I would like to know what authority you have for making the statement that this Church had nullified marriages to such a degree as to make it amount to a limited cognizance of divorce.

Impediments which the Church, as I understand it, has thrown in the way of a proper marriage, are, relatively speaking, similar to the impediments which the laws of most States throw in the way of a legal marriage. It must be borne in mind, however, that the theory of each of the two is different — one is a civil contract and the other a sacrament — and that the impediments are therefore somewhat different; the degrees of consanguinity have been relaxed in many instances, and the degrees of affinity differ from those of the law, and there being other impediments to a proper marriage. But I beg to differ with you as to the declaration of a null marriage being similar to a divorce, because, as I understand it, there is precisely the same difference in a declaration that a marriage is null and a divorce by the canonical laws as there is between the same two degrees in the civil court.

The Catholic Church has in all ages, as I understand it, proclaimed marriage as not capable of dissolution.

It may be possible for you to find the utterances of several Church councils, particularly during the seventh and eighth centuries, and more particularly the Frankish councils, which perhaps make utterances at variance with these, but those utterances were not sanctioned, as far as I can tell, by the highest authority in the Roman Church, that is, the Pope, and consequently they cannot be attributed to him, nor to that Church. Nor are such utterances, as far as I have been able to find — and if I am in error I would like to be corrected — verified by anything that any of the general councils of that Church have passed as articles of faith.

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I am not able at this time — although of course that is not saying that they do not exist — to recall any very noted cases where annulments were made by the Roman Church which had the effect of divorce. On the other hand, there comes to my mind at first reflection the case of King Henry the Eighth of England, who applied to the Papal See for an annulment of his marriage on the ground that his wife, Catherine of Aragon, had been within the prohibited degrees of affinity, namely, that she was his brother's widow; and if we look at the decision from purely human motives, and if the Roman Church had no other course to pursue than purely human motives, at least a tactful decision of that question would have been to have allowed the annulment, and for the king and his wife to have been separated. Failure to so rule caused that Church the loss of England; and again, when it was possible to have regained the English Church, she failed to recognize the legitimacy of Elizabeth, which might have changed the whole course of modern history.

This case comes to my mind off-hand. There may be other cases, probably, but it does not bear out the statement made in your article that the impediments were placed there that they might be broken down and divorce under another name obtained. The Church knows these separations, or some of them, under the name of *divortium imperfectum*, and *divortium plenum*. But neither was a divorce, as we lawyers understand it in the modern time.

I have no disposition to go into a theological argument, and that is not the purpose of this inquiry. I have long held the opinion that the difference between a Catholic view of marriage and divorce, and the acceptation of the same subject by the general community, grew out of the fundamental differences between the theory of the Catholic Church and our theory of government on such matters. The Catholic Church holds marriage as a sacrament; the law, as a civil contract. The two theories are so diametrically opposed to each other as not to be possible of comparison. I do not venture to say which is correct, because that is a question for which we must look deeper for a solution, but I, together with your reader who made the inquiry as printed in the November LAW NOTES, have often heard the statements made. They are in the air everywhere where the doctrine of the Catholic Church is attacked; and outside of the commentaries by a few authors, whom others have followed, I have been unable to find authority for the statement, and I ask if you can give me the authority upon which you base your statement in the November NOTES.

H. WINSHIP WHEATLEY.

WASHINGTON, D. C.

[From many letters dealing with our remarks in the November number above quoted, Mr. Wheatley's learned communication has been selected as fairly representative of the objections and inquiries of our esteemed correspondents. It ought not to be necessary to state that LAW NOTES in discussing the question which aroused so much epistolary interest is not the spokesman of any creed or religious belief. Our attitude is entirely unbiased, and it is far from our purpose to make any attack on the good faith of the Catholic Church in its position on the divorce question. On the contrary, the firmness with which, to-day, it stands for the principle of the indissolubility of the marriage tie commands nothing but admiration.

We know of no place where the cases in which marriages have been nullified are collected. In the natural order of things such a repository of special instances could hardly exist. Any authority to which we might refer our correspondent must necessarily be within or without the Catholic Church. If by "nonpartisan" he means one who is a Catholic we cannot accommodate him. We believe he will hardly take exception,

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however, to the rank and standing of the authors who wrote as follows of early conditions:

"Reckless of mundane consequences, the Church, while she treated marriage as a formless contract, multiplied impediments which made the formation of a valid marriage a matter of chance. . . . The men and the women who are the pawns in this game may, if they be rich enough, evade some of the forfeits by obtaining papal dispensations. . . . Owing to the fact that the Church had but slowly made up her mind to know no such thing as a divorce in our acceptation of that term (*i. e.*, the dissolution of a valid marriage) the term *divortium* is currently used to signify two very different things, namely, (1) the *divortium quoad torum*, which is the equivalent of our 'judicial separation,' and (2) what is very often called the *divortium quoad vinculum*, but is really a declaration of nullity. The persistence of the word *divortium* in the latter case is a trace of an older state of affairs (Esmein, *op. cit.* ii. 85), but in mediæval practice the decree of nullity often served the purpose of a true divorce; spouses who had quarreled began to investigate their pedigrees and were unlucky if they could discover no *impedimentum dirimens*." — Pollock and Maitland, *History of English Law* (2d ed.), vol. 2, pp. 385, 389, 393.

As to historical instances, we ask our correspondents to look up in their histories the bull obtained from Clement VII. (the Pope who would not free Henry VIII.) by Henry's favorite the Duke of Suffolk, and the divorce which Henry's sister, Margaret of Scotland, obtained from Angus her second husband. — Ed. Law Notes.]

Valued Policies.

To the Editor of Law Notes:

Sir: Will you inform an inquiring mind why our always sympathic and sometimes intemperate American Bar Association takes up with so much enthusiasm the cause of the insurer against the insured in the perennial controversy about so-called "valued policies"? I venture to think that some members of our committee are too closely in touch with the insurer's side of the question to appreciate the arguments the other way. In the report made to this year's session these policies were called premiums upon fraud, or something like that; yet many States have statutes practically making all fire policies of that class. Are these acts all wrong? If so, why? The arguments have never been printed by the committee or the association, to my knowledge, and I would like to know what they are.

All the statements I have seen pass over in discreet silence the fact that no insurance company is compelled to issue any policy whatever on any given risk; yet there is no difficulty in over-insuring almost anything. Life insurance contracts are all valued, but those companies do not ask to be protected against their ignorance or negligence. It seems essentially unfair that an insurer should for years take premiums on a risk and when undeniable total loss occurs try to get out of the payment of the limit insured by raising the question of value; if it has investigated and agrees to the valuation, why should it not be bound to pay? If it has not done so, why should it not be bound, when the failure was due to its own neglect?

Fraud would vitiate a valued policy as well as any other, it seems; and in any event it must be proved. If the case smells of fraud, many difficulties arise.

The valued policy has been for years in use in marine insurance, and while it has produced its crop of litigation, I cannot see why it is unjust, if the insured pays for it. Is it not a fact that insurers do not want to face the complaints attendant upon a raise of rates, if the valued policy is really more of a risk? And is it not a fact that it is inherently unfair to accept the premium, and when a loss occurs, say that the risk was not assumed *on the scale of the premium paid*? Of course I am referring to total loss of the thing insured.

If the various statutes fix rates, other questions arise, among them the usual constitutional ones; or if they compel the insurer to take undesired liabilities, under improper penalties, etc. But if I agree with my underwriter to pay premiums on a risk of $10,000, and do so; and, in the absence of fraud, the insured thing is totally destroyed by a clause within the policy, it certainly seems just that he should pay the value he has himself assigned.

I await light.

T. J. Johnston.

New York City.

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The New Supreme Court Justice.

THE vacancy in the United States Supreme Court, due to the death of Mr. Justice Peckham, has been filled by the appointment and confirmation of Judge Lurton, of the United States Circuit Court of Appeals for the Sixth Circuit, notwithstanding the protest that arose when it became known that President Taft intended to appoint him to the vacancy. His appointment is generally looked upon as excellent. He is a Democrat, which is highly desirable in view of the fact that six of the present justices are Republicans. He has also had a long and honorable judicial career stretching over twenty-three years. But his age is sixty-six years, and although at present in excellent physical condition, the point has been made, that he may soon be unequal to the heavy tasks imposed on our highest justices. While we are inclined to the opinion that the United States Supreme Court should, ordinarily, be made up of men who have shown their fitness for judicial work in the lower courts, it may be that it is undesirable to have them serve as long an apprenticeship as Judge Lurton has done. Whether President Taft would have appointed a man of that age to the Supreme bench, had there been no strong attachment existing between them, is perhaps doubtful.

Condition of the Supreme Court Docket.

IN view of the plea by many for younger men in the United States Supreme Court, brought out by Judge Lurton's appointment to that court, a consideration of the condition of its docket, as disclosed by the recent annual report of Attorney-General Wickersham, is desirable. It appears that the number of cases undisposed of at the end of the 1908 term was 303, as against 478 undisposed of at the end of the 1907 term. Four hundred and thirty cases were disposed of at the 1908 term, the docket of which contained 908 cases, made up of 421 cases carried over from the 1907 term, and 487 new cases. Of course it would be impossible for a bench, however energetic, to keep up with the increased business, and the court will have to be relieved by the institution of other courts, as in 1891, when the Circuit Court of Appeals was organized, or by increasing the jurisdiction of courts now in existence. It may be that in time the Supreme Court will confine itself exclusively to the consideration of constitutional questions. Meanwhile, however, care must be taken in selecting only judges who are physically able to dispatch business. President Taft's known solicitude for the bench is a guaranty that we shall not suffer in this respect.

Tennessee and Her Lawyers.

THE frequency with which Tennessee lawyers are mentioned in connection with appointments to office under the present administration is a matter of comment. Judge Lurton, as is well known, belongs to Tennessee. So does Gen. Luke E. Wright, who has been so many times honored in the past and now seems likely to succeed Judge Lurton in the Sixth Circuit. Secretary of War Dickinson is another son of Tennessee. It is true Chicago claimed him temporarily while he was acquiring fame and fortune as a railroad lawyer, but Tennessee has always been considered his home. Another Tennessee lawyer who has come to the front quite recently is Edward T. Sanford, at one time Assistant Attorney-General of the United States, now United States District Judge of the Eastern and Middle District of Tennessee, and mentioned as likely to be a member of the new Customs Court of Appeals. As President Taft once sat as a judge in a circuit which included Tennessee, and presumably knows the bar of that state, it is not unreasonable to assume that lawyers there will continue to receive substantial recognition. We are not ready to believe that merely because he went outside the bar and selected Mr. Lee McClung, also of Tennessee, as Treasurer of the United States, he meant it to be understood that the good things of the Tennessee bar had been exhausted. We are more ready to believe that the fact that Mr. McClung was a Yale man overcame Mr. Taft's fondness for Tennessee lawyers. If these inferences are worth anything, it would seem to follow that a person who could claim Tennessee as his home, Yale as his college, the law as his vocation, and possibly golf as his avocation, would be an irresistible proposition to our President.

Oral Betting.

THE decision of the New York Court of Appeals in *People ex rel. Lichtenstein* v. *Langan*, just reported in the advance sheets of 196 N. Y. at page 260, has given much trouble to the nonlegal press. The case was an appeal by the State from the discharge on habeas corpus of the relator, who was held in custody for an alleged violation of the statute against bookmaking commonly known as the Hart-Agnew law, embodied in section 351 of the Penal Code, now section 986 of the Penal Law of 1909. This statute provides that "any person who engages in . . . bookmaking at any time or place; or any person who keeps or occupies any room, shed, tenement, . . . or who occupies any place or stand, . . . with books,

papers, apparatus, or paraphernalia, for the purpose of recording or registering bets or wagers, . . . and any person who records or registers bets or wagers, . . . upon the result of any trial or contest of skill, speed, or power of endurance, of man or beast, . . . is guilty of a misdemeanor." The court affirmed the relator's discharge, holding that the mere laying of odds is not a crime, and that to constitute the statutory offense of bookmaking there must be a recording or writing out of the odds laid.

Many of the religious newspapers especially, and not a few secular journals, have conceived the idea that by its decision the New York Court of Appeals has set the seal of its approval on betting, and practically nullified the efforts of the legislature and the executive to do away with the evils of racetrack gambling. Thus, so respectable and usually sound a newspaper as the Springfield (Mass.) *Republican* says editorially that "the doctrine that betting and gambling are as different as right and wrong now has the sanction of the New York Court of Appeals. . . . Yet not even these judges, probably, would approve the open teaching in Sunday schools of the ethical value of the 'oral betting' which the law permits."

The difficulty with these newspapers is that as usual they fail to appreciate the duties and functions of the court. The abstract question of right and wrong from an ethical or even a moral standpoint was not before the court for consideration and could not form the basis of the decision. The court was bound merely to declare the law as the legislature made it, and the question was not that of innate and inherent right and wrong, but that of crime or no crime under the wording of the particular enactment.

Another principle that the lay press fails to recognize is the fundamental canon that in determining the meaning of a statute the court is to consider the antecedent evil and the purpose of the legislature in regard to that evil. Judge Haight points out, in the case under discussion, that the evil which the legislature sought to prevent, by the enactment of the statute, was the scheme under which, by means of carefully compiled schedules, written out and posted or circulated, and by memoranda of bets made, the bookmakers were enabled to induce men, women, and persons of immature years to part with their money to the profit of the bookmaking fraternity no matter what the result of the race might be. And Chief Judge Cullen, in a concurring opinion, says: "Doubtless the legislature, by the enactments before us, intended to suppress public gambling on racetracks and elsewhere. It is also true that in the judgment of at least part of the community all betting or gambling is wrong. . . . The law has laid hold of certain incidents on the theory that, those being prohibited, the evil itself will be suppressed because of the impracticability of carrying on gambling on a large scale without some of the accessories denounced by the statute. How far this plan has proved successful in operation is for the legislature, not the courts, to determine, and we cannot hold that the act of the relator constitutes a crime unless it falls within the terms of the statute."

This is unimpeachable doctrine, and we think the court's conclusions are fully justified, and indeed must have followed inevitably from the very wording of the enactment under consideration. If the statutory language does not express the real intention of its authors, the remedy is an amendment of the enactment; but such amendment is not the business of the court.

Secret Divorces.

IN the Astor divorce case a reference was had for the taking of testimony and the finding of the facts. The papers were sealed, and the public was left in ignorance of the evidence on which the divorce was granted, and the daily papers were probably deprived of much sensational copy. The New York procedure which permits secret divorces has been denounced as an innovation designed to afford the rich an easy and comfortable method for the dissolution of marriage. There is much to be said against this practice and there is almost as much to be said in favor of it. The practice is allowed only in cases of absolute divorce, the only ground for which in the State of New York is adultery. The reference for the taking of testimony can only be had where the defendant appears, and the allowance of a reference and the sealing of the evidence rests in the sound discretion of the court. Reliance must be had upon the integrity of the judiciary to prevent an abuse of the practice. It is, of course, a mistake to suppose that the procedure is only for the rich. The reference necessarily involves additional expense, but is not beyond the reach of the suitor with the more limited purse, and it may be assumed that a judge would be just as ready to grant privacy to one divorce as another upon sufficient cause shown. There is much in the testimony in such cases that is not elevating to the public morals and may better be taken behind closed doors. The children of a marriage deserve some consideration when it comes to spreading broadcast in the public prints the misdeeds of their parents. And yet privacy in a judicial proceeding and the keeping of the public in ignorance of the grounds upon which action is taken seem contrary to our ideas and institutions. Whether the practice has enough to commend it to overcome its evils is questionable. Not the least among these evils is the effect upon the public confidence in the courts. And society, for its own protection, is entitled to know of the conduct of its members which has been the subject of judicial investigation. So far as the New York "four hundred" is concerned the marital misconduct of its members, even when published, has never seemed to affect their good standing in the set. One of that distinguished number when divorced upon grounds that shock the common decency of mankind can still move among his fellows with unabated popularity and prestige. If secret divorces are intended to spare the sensibilities of the litigants it would seem that they might be withheld from the four hundred and granted to all others.

The Steinheil Case.

PUBLIC attention has recently been fixed on the trial of Madame Steinheil in Paris, which resulted in the acquittal of the accused by the jury. Much condemnation of the French criminal procedure has followed, and it is said that so much dissatisfaction with that procedure has developed in France that it is likely to undergo radical changes in the near future. A commission has been appointed to consider needed reforms. It is indeed strange to those familiar only with the criminal procedure of America and England, by which the rights of accused persons are hedged about with every imaginable safeguard and in which the judge always sits in unmoved impartiality, to read of a murder trial where the judge appears as an active agent of the government in searching

out incriminating evidence and puts the accused through a scathing examination and cross-examination in an endeavor to compel a confession or disclosure of guilt. To place the presiding magistrate of a trial in such a rôle must go far toward destroying the dignity of courts and the public confidence in them. It does not appear, however, that this procedure is inherently an outrage against humanity and justice or likely to result in the conviction of the innocent. The judge simply performs the duties of prosecuting attorney and examines the accused very much as any prosecuting attorney would when the defendant takes the witness stand. The facts brought out cannot be very much more damaging when elicited by the judge than if elicited by some other officer of the court. The bullying and baiting of the defendant may be carried so far as to render the proceeding intolerable, and it is not unlikely that this occurred in the Steinheil case, but a severe examination of the accused is not to be condemned offhand as inquisitorial tyranny. While the activities of a public prosecutor are necessarily foreign to the proper functions of a judge, we are not prepared to assert that the French methods of examination are such as to hide the truth from the jury, or expose the accused to the danger of an unjust conviction. The judicial exposure of crime is at best attended with enormous difficulties, and it is safe to say that these difficulties are unnecessarily increased by the requirements of the American procedure, and the opportunities it affords to escape conviction. We of this country have magnified the rights of accused persons until the right of the people to the conviction of criminals has become partly obscured. We are told with horror that the accused in a French court is presumed to be guilty instead of innocent. Well, this is a perfectly logical presumption, having solid basis in human experience. On the other hand, our presumption of innocence, however much we treasure it as a bulwark of liberty, is illogical and at variance with the facts so far as investigation at that stage of the case has disclosed them.

Hysteria in the French Courts.

IT seems that the French criminal procedure is more open to criticism as a farce than as an inquisition. Rules of evidence are apparently lacking, and no restraint is placed upon the utterances of participants in the trial or spectators. Opinion and hearsay are competent. We can imagine the honest purveyor of cat's meat to Madame Steinheil rushing into the court room and dramatically declaring that he believes the lady to be innocent; and the reporters would record this as a sensational development in the trial and one producing a profound impression on the jury. It seems not uncommon in the French criminal trial for some unknown person to appear before the court and proclaim that he himself and not the accused did the murder. Such magnanimous conduct cannot fail to command the admiration of the court and audience, but the chivalrous party is told to go on and forget it, and the trial proceeds. In a recent detective story purporting to give an accurate description of a French court proceeding it is related that during the trial a man came unsummoned before the judge and declared that he was able to disclose the identity of the real murderer. The court thereupon ordered him thereto to proceed and tell what he knew, but the cautious volunteer refused to speak until six o'clock, which was some time off, and so the court had to wait. The court adjourned and reconvened at the time set by this accommodating informant, whereupon the name of the guilty person was disclosed, and a great sensation followed. The delay, however, had afforded the criminal time to make good his escape. The rules of evidence and procedure in France no doubt need radical reformation.

The Standard Oil Decision.

THE much abused and harshly criticised Sherman Anti-trust Law is gradually emerging from the unshapen-clay stage of its judicial development, and, under the hand of the judiciary, is being moulded into such form as to render it an effective weapon in dealing with at least some phases of the trust problem. The recent Standard Oil decision, the latest touch in the moulding process, is hailed in some quarters as a vindication of the law, and it is reported that Attorney-General Wickersham considers the decision "one of the most important ever rendered in this country." In an opinion written by Judge Walter H. Sanborn and concurred in by Judges Van Devanter, Hook, and Adams (Judge Hook concurring in a separate opinion), the United States District Court for the Eastern District of Missouri, applying the principles of law and the interpretation of the Sherman Anti-trust Law laid down by the Supreme Court in the Northern Securities case, decrees, in effect, the dissolution of the Standard Oil Company of New Jersey, and sounds the death knell of the "holding company" as a method of carrying on the business of a number of potentially competitive private corporations engaged in interstate commerce. In his concurring opinion Judge Hook says: "A holding company, owning the stocks of other concerns whose commercial activities, if free and independent of common control, would naturally bring them into competition with each other, is a form of trust or combination forbidden by section 1 of the Sherman Anti-trust Act. The Standard Oil Company of New Jersey is such a holding company. . . . The defendants in the combination are also monopolizing interstate and foreign commerce in petroleum and its products, contrary to section 2 of the act. A wrongful method employed to gain the monopoly is found to exist in the unlawful combination above mentioned." The fact that the Standard Oil decision was rendered by a unanimous bench, and the further fact that, as the Sherman Anti-trust Law makes no distinction between railway companies and private corporations, the decision of the Supreme Court in the Northern Securities case would no doubt be controlling on an appeal from the Standard Oil decision, encourage the belief that the decision of the Circuit Court will be affirmed by the Supreme Court in case an appeal is taken. Should such a result follow, another step forward in the matter of trust regulation and control will have been made. And irrespective of the legal aspect of the question, there is no gainsaying the fact that the moral effect of the decision will be good. Moreover, the Sherman Anti-trust Law, which in recent years has been so often "weighed in the balance and found wanting" by its critics, is perhaps not such an ineffective piece of legislation as has been supposed.

The Practical Effects of the Decision.

THE new life and power which the Standard Oil decision gives to the Sherman Anti-trust Law is found not only in the declaration that a "holding company" is a form of combination forbidden by the law, but also in the condemnation which falls on any agreement or arrangement or device which has a like effect. A means of dissolving the Standard Oil Company of New Jersey is left open by the decision, to wit: "The distribution among the stockholders of the holding company of the stocks it owns in the subordinate companies to the end that each corporate member of the combination engaging in interstate or foreign commerce shall in future have and exercise corporate independence, with its own particular set of stockholders not united with or tied to those of its competitors, actual or potential, under a single or common control." The following forms of combination are specifically condemned by the decree, provided they would have the effect, if resorted to, of directly and appreciably restraining commerce: The conveyance of the physical property and business of any of the parties to the "holding company" combination to a potentially competitive party to the combination; the conveyance of the property and business of two or more of the potentially competitive parties to the combination to any party thereto; placing the control of any of the subsidiary corporations in a trustee, or group of trustees; causing the stock or property of any of the subsidiary corporations to be held by others than the equitable owners thereof; any express or implied agreement or arrangement between the subsidiary corporations, or any of them, relative to their control or management, or to the price or terms of purchase, sale, or transportation of their products, or relative to the quantities thereof purchased, sold, transported, or manufactured by them. Freedom of competition is thus established between the subsidiary companies which have composed the "holding company," and with the end of the "holding company" it seems that the monopoly will naturally disappear, for "it is axiomatic that monopoly is not dangerous so long as competition is free." But even a monopoly of part of interstate and international commerce by legitimate competition, however successful, is not denounced by the Sherman Anti-trust Law. On this point, Judge Sanborn says: "Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and every transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition, unless each competitor is permitted to attempt to draw to himself, and thereby to monopolize, some part of the commerce. This is not, it cannot be, the proper interpretation of this section. It must be so construed as to abate the mischief it was passed to destroy, and to promote the remedy it provided. It was enacted, not to stifle, but to foster, competition, and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts."

Chief Justice Baldwin on Airships.

SIMEON E. BALDWIN, chief justice of the Connecticut Supreme Court, professor in the Yale Law School, and for years a leading member of the American Bar Association, in a lecture recently delivered at New Haven, Conn., takes up the subject of the airship and its future relation to law. He is of the opinion that it has ceased to be an experiment, will be commercially usable, and must soon attract the attention of lawyers by reason of the laws which will be necessary for its control. He even advocates the calling of an official international congress to consider the international laws covering aërial navigation and to frame adequate international agreements on the subject. It has always been the theory of the law that an owner of land had title to the space above as far as the heavens, in which case it would seem that an airship passing over land without the consent of the owner commits trespass, and may be enjoined. It is probable, however, that this theory will not be allowed to stand in the way of the successful use of the airship for commercial purposes. In fact, Judge Baldwin says that "perhaps the landowner has no legal right in the air except as the occupancy of the same may be a detriment to his land." He also says that the "navigation of the airship is not a natural right," but suggests that the State may have power to grant the right in the form of a franchise or license, without involving the rights of landowners unless actual damage results. But he says that "should an airship in passing over the property of a landowner ruin his trees, or should the proprietor of a fleet of airships continually menace the safety of the landowner or damage his property, there would be cause for action." Whether a government license would protect a person who accidentally falls and injures persons below, Judge Baldwin does not answer; but he believes that "should a person be hit by an airship, the *prima facie* evidence would indicate that he could bring an action against the proprietor of the ship and the master who was sailing it, whether the person was hit on his own land or on the land of some one else."

Compulsory Arbitration in Pennsylvania.

WIDE attention has been attracted by Mr. J. McF. Carpenter's account, in LAW NOTES for December, of the "Lawyers' Court of Compulsory Arbitration" established in Allegheny County, Pa., by the local Bar Association. This was to be expected, for Mr. Carpenter makes out a strong case in favor of the "Lawyers' Court," although statutory provisions for compulsory arbitration, such as have existed for many years in England and in this country in Pennsylvania, have not generally found favor in other jurisdictions, and particular statutes in some States have been held to be unconstitutional. Moreover, the Pennsylvania statute has not been popular among either lawyers or litigants, and comparatively few submissions have been made under it in recent years.

The scheme advocated and put into practice by the Allegheny County Bar Association, though founded on the Compulsory Arbitration Act, is as yet, in the absence of

legislative approval, compulsory only in name. That is, although arbitration may be compelled, the carrying on of the proceedings in the particular manner described by Mr. Carpenter is discretionary with the parties and the prothonotary. No obligation rests on the latter to appoint the "official arbitrators" designated by the president of the Bar Association, even if the parties so desire; and after the rule to arbitrate is entered, either party may elect to proceed strictly according to the statutory method. In the few months during which the extralegal procedure has been tried, however, its advantages over that laid down by the statute have been made so manifest that there is every prospect of legislation in the near future amending the statute so as to provide for and incorporate the Bar Association's plan.

Since the publication of Mr. Carpenter's article the official arbitrators for January, February, and March have been designated by the president of the Bar Association, Mr. Frank C. Osburn. The list contains the names of some of the most able and prominent lawyers of western Pennsylvania. Those appointed for January are C. C. Dickey, Samuel S. Robertson, and Henry G. Wasson; alternates, Walter Lyon, James M. Clark, and Henry A. Davis. For February the appointees are John S. Wendt, Thomas S. Brown, and Charles D. Gillespie; alternates, Gordon Fisher, William W. Wishart, and William Macrum. The members of the bar to serve in March are Albert York Smith, J. Boyd Duff, and George R. Wallace; alternates, Henry Meyer, George C. Lewis, and Harry W. McIntosh.

There is no doubt that the procedure in question tends to the speedy and economical disposal of such causes as are in their nature capable of submission to a tribunal other than a jury; and a tendency to dispense with juries in civil cases is evidenced in many quarters by the growing popularity of references and trials to the court. The report made to the County Bar Association early in December shows that during November the "Lawyers' Court" tried forty-five cases, and that the proportion of appeals from the decisions of the arbitrators remains small, being less than twenty per cent. of the total number of cases adjudicated since the foundation of the court. It is not surprising, therefore, that the Pennsylvania experiment is being watched with considerable interest, and if the inferences naturally to be drawn from its success up to the present time are borne out by time and experience, the Allegheny County plan will undoubtedly be tried by bar associations in other States.

May a Trust Company Draw a Will?

IT'S a nimble dollar that escapes the activities of our large title and trust companies. With capital and surplus generally running far into the millions, with official salaries which draw our high financiers into their service, they pick up much of the small change which formerly found its way into the pockets of the lawyers. The title companies — some of them, at least — will draw for you a lease or a deed, in perfectly good and legal form, neatly typewritten, for one dollar. There is a trust company in New York — the newspapers say that it is one of Mr. Morgan's string of financial institutions — which advertises that "it will draw your will." What it charges for this service we are not informed. A clerk with some little conveyancing skill may fill out a blank deed or lease, but there is a lawyer hidden away somewhere who draws the will. And here we quote from chapter 483 of the New York Laws of 1909:

> "It shall be unlawful for any corporation . . . to render or furnish legal service or advice, or to furnish attorneys or counsel . . . or to advertise that . . . it has . . . an office . . . for furnishing legal advice, services or counsel."

The statute specifically exempts the title companies from its operation, but may a trust company draw a will?

Labor Unions and Contempt Proceedings.

THE affirmance by the Court of Appeals of the District of Columbia of the decree adjudging Samuel Gompers, Frank Morrison, and John Mitchell guilty of contempt of court in violating the injunction in the Buck's Stove and Range Company Case, whereby the defendants with others, individually, and as representatives of the American Federation of Labor, were restrained from conspiring to boycott the business or products of the complainant Stove and Range Company, tends somewhat to show how far labor organizations may go in carrying out their policies for the redress of their grievances, either supposed or otherwise. Although the decree was affirmed by a divided court, Mr. Chief Justice Shepard rendering a strong dissenting opinion, the majority opinion, in principle at least, seems to be sound. The object sought and the end attained by the decision, namely the discouragement of wilful and wanton disregard of law as exemplified by the acts of persons and organizations claiming to act in the interests of labor generally, is salutary.

No one will have the temerity to say that labor organizations are illegal or that labor may not combine for legitimate purposes. Nor does the decision in any sense condemn such organization on the part of workingmen. If such were the case it would meet with the condemnation of all right thinking citizens, and justly so.

It must be admitted that labor has its grievances. While this may be true in many instances, it is no excuse for the violation of the law, much less the direct mandate of a court in a case decided by it and where its judgment is in full force. When such a thing occurs, the dignity and safety of the court are at stake; and when the dignity and safety of the court are endangered a long step has been taken toward the destruction of one of the greatest safeguards of liberty. From a careful perusal of the opinion of the court in the case in question it will readily be seen that the court has no quarrel with the American Federation of Labor, or any of its representatives. It only seeks to vindicate itself, not solely at the instance of the complainant, but for the good of all.

REFORMED PROCEDURE.

AFTER having passed through the several stages incidental to all reforms, the question of the law's delays is about to enter the mould of curative legislation, or perhaps, as some who prefer to linger by the roadside of antiquity would have us believe, destructive legislation. That there are vexatious and unnecessary delays in the prosecution of lawsuits must be conceded, else why so much smoke? Of this there has been endless quantity during the past few years, and it has come not alone from

the crank and the disgruntled suitor, nor yet from writers of magazine articles and editors, who, perceiving a good chance to increase their store of wealth, have seized upon the time-old topic of law and lawyers, neither understanding the one nor appreciating the other, but it has come also from no less a personage than our good and honored President, from the members of the highest courts, from the judges who sit in the trial of causes, and from many distinguished and able practitioners whose motives cannot be impugned. Therefore, we must concede that there is something wrong in the present existing system of administering justice, both civil and criminal. We are not convinced, however, that the administration of justice as it now exists is an absolute failure. A wrong, real or fancied, always has been and always will be magnified out of all proportion to its real seriousness. We receive the impression from reading the lay press, and speeches made by persons whose information must be of a low grade, that technicalities control the greater number of lawsuits, that an action is seldom tried and decided on the merits, that reversals and retrials are the rule and that affirmances are the rare exception. Such, however, is not the case. We admit that too large a percentage of the cases is appealed. That the appellants are encouraged by the result, however, is not borne out by the number of reversals. In the last issue of LAW NOTES, the editor, in discussing reversals on appeal, very plainly showed that it does not pay to appeal, because the greater chance is on the side of the respondent.

On March 9, 1909, the Association of the Bar of the City of New York adopted a resolution authorizing the chair to appoint a committee of five to consider the simplification of New York Procedure. This committee adopted, printed, and published its preliminary report in June last. On November 1, 1909, the committee submitted its final report, which contains many recommendations concerning the amendment of the Code of Civil and Criminal Procedure and the court rules.

The committee recommends among other things that "all applications to strike out a pleading or any part thereof, or to render it more definite and certain, should be made as an omnibus motion within twenty days after the service of the pleading, and an application to strike out an entire pleading should be a waiver of the moving party's right to demur." There can be no question that such a change would be a great advance over the present system whereby a lawyer trained in the niceties of pleading and practice may delay the trial of a cause on the merits for a considerable length of time through successive motions and stays on appeals from the decisions thereof. There seems to be no good reason that can be advanced against having questions of pleading of every name and nature settled and determined at one time. It is of course highly important that parties should bring their causes before the court by means of proper pleadings, but it is not necessary for parties to delay the trial of a cause for a year or more before the pleadings can be whipped into shape.

Another recommendation of the committee is that "double time when papers are served by mail should be abolished." The double time requirement, as pointed out in the report of the committee, is no longer necessary. Service by mail is as reliable and as speedy as personal service, if not speedier. The double time requirement originated in the time when it took days instead of hours to travel. We suggest, also, that the time within which a defendant is required to answer should be reduced from twenty days to (say) fourteen days. There is no reason why a defendant cannot interpose an answer within two weeks after the service of a complaint. Of course it must be conceded that in certain complicated cases a longer period may be necessary, but in the ordinary run of actions the attorney for the defendant can as easily draw the answer on the thirteenth day as he does under the present system on the nineteenth day.

The committee in considering the question of trials made the following very important recommendations:

"Upon a trial either party should be permitted to call his opponent and cross-examine him."

"The decision upon a demurrer should be an order; no finding of fact or law should be required. Costs upon demurrer should be discretionary."

"Upon a trial by jury, where the evidence is so preponderating in favor of one side that a verdict contrary to it would be set aside as against the evidence, it should be the duty of the trial justice to direct a verdict. Where there is no evidence to support an issue the complaint should be dismissed."

"The modern practice of allowing a trial justice to enter judgment, notwithstanding the verdict of the jury, where the case depends upon legal questions, and these having been determined by the court a verdict the other way would be against the law, should be adopted."

"The equity practice of making the dismissal of a complaint a final determination of the suit, unless leave to renew the action was given or the dismissal was expressly stated to be without prejudice, should be adopted in all cases."

Of these recommendations probably the most important is that relating to the authority of a trial judge to direct a verdict in cases where the evidence is so preponderating in favor of one side that a verdict contrary to it would be set aside. In support of this recommendation the committee made the following statement: "Until the decision of the McDonald case (167 N. Y. 66) the Court of Appeals applied the rule that a verdict can be directed as above stated. In the McDonald case that court disregarded its own repeated decisions and held that in such a case the trial judge could not direct a verdict, but could only set aside an erroneous verdict (*Bulger* v. *Rosa,* 119 N. Y. 459, 464; *Linkhauf* v. *Lombard,* 137 N. Y. 418, 425–6; *Hemmens* v. *Nelson,* 138 N. Y. 517, 529–30; *Laidlaw* v. *Sage,* 158 N. Y. 73, 96–7). The legislature should be asked to settle this conflict by restoring the ancient rule."

After a careful reading of the opinion in *McDonald* v. *Metropolitan St. R. Co.,* 167 N. Y. 66, we are convinced that the court did not, in any way, ignore or disregard prior decisions bearing on the subject of the power of the trial court to direct a verdict. The court held that: "The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law. If a court of review having power to examine the facts is dissatisfied with a verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury so that the issue of fact may be ultimately determined by the tribunal to which those questions are

confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover." The court relied on *Colt* v. *Sixth Ave., etc., R. Co.*, 49 N. Y. 671, and *Bagley* v. *Bowe*, 105 N. Y. 171, 179, and referred to *Fealey* v. *Bull*, 163 N. Y. 397. In the case last cited it is clearly demonstrated that it never was the law of this State that the trial court might direct a verdict in every case where the evidence was so preponderating in favor of one side that a verdict contrary to it would be set aside, but only where no evidence is introduced in behalf of the party against whom the verdict is directed. And by no evidence is not meant literally none, but that there is none which ought to satisfy a jury that the fact sought to be proved is established. The court reviewed the earlier decisions and plainly showed that there was no conflict between them and the later decisions. Therefore the contention that the Court of Appeals of this State has stultified itself is not sustained by the decisions. As to the merits of the recommendation, we believe that there is nothing of importance to be gained by making the change, and a great deal to be lost. In the first place it is a serious inroad upon the right to trial by jury. When a verdict is set aside because contrary to or against the weight of evidence, the cause must be again submitted to a jury for the determination of those matters peculiarly within the province of the jury. If a verdict is directed in favor of one party because a verdict in favor of the other would be against the weight of evidence, then the judge takes upon his shoulders the function of the jury in that he assumes to determine a question of fact. So long as the jury system is a part of our institutions the peculiar province of the jury should be safeguarded against encroachment by the court. The changes recommended are without merit, and if put in force would lead to far greater abuses than now exist.

There is certainly some ground for the assertion that the trial of a cause is considered by many as a form through which every case must pass before reaching the appellate courts where the real decision is to be had. This condition may be due to defects in the present law relating to appeals, or it may be, and most likely is, due to the temperament of the American people, who do not give up until every stone is turned. Again, the manner and method of the proceedings in a trial court do not impress one with the absolute correctness of the judgment rendered, and even in the intermediate appellate courts the bearing of the judges on the bench is altogether too often such as to give the attorneys reason to believe that their cause will not receive that care and consideration which they believe it deserves. It has been remarked often that the manner of the intermediate appellate judges amounts to contempt — not of court, but of the lawyers. There may be good reasons for the judges to employ their time while on the bench in doing almost anything other than listening to the argument of the case. Be that as it may, however, it is their duty to give their attention to every argument, although it may be of little weight.

The result of these and other causes is that too great a percentage of the causes is appealed, thereby delaying the ultimate determination of the controversy for so long a time that when success comes to one party or the other the victory is an empty one. There should be an end to litigation, and the end should not be far from the beginning if the results sought to be obtained thereby are to follow. With this in view, the committee recommended several changes affecting appeals and the powers and duties of appellate courts. Those changes are as follows:

"The Appellate Division should exercise all the constitutional power it has as the successor of the chancellor to award final judgment on appeals from the Special Term and from surrogates, instead of merely granting new trials as it does now under certain technical precedents. On all appeals in civil cases the Appellate Division should have at least the same power to disregard technical errors that it and the General Term have had in appeals in criminal cases since the adoption of the Code of Criminal Procedure."

"An appeal from a judgment entered upon the verdict of a jury should bring up for review the question of fact as to whether the verdict is contrary to the evidence, without requiring the present additional appeal from an order denying a motion for a new trial upon the trial judge's minutes, if the appellant desires to raise any question of fact."

"Upon a reversal by the Appellate Division in any case it should be presumed that the reversal was upon the law only, unless the contrary appears in the order or judgment of reversal, thus making the rule now applicable on appeals from Special Term judgments also applicable to appeals from Trial Term judgments."

"Appeals to the Appellate Division from order denying motion for new trials should be abolished."

"All appeals to the Appellate Division should be taken within thirty days, and all appeals to the Court of Appeals within sixty days from the entry of the judgment or order appealed from."

"Upon an appeal to the Court of Appeals the opinion of the Appellate Division should, for the purposes of the appeal, be deemed a part of the judgment roll or appeal papers."

Of these several recommendations the first one is most apt to produce the greatest amount of good. The rule thus advocated has been in vogue in criminal cases and there does not seem to be any sound reason for not using it in civil cases. There is no sense surely in casting the burden on the respondent to show that there are no errors, and if there are errors that they are harmless. Is it not a presumption that every step in a judicial proceeding is properly taken? Then why should a respondent be compelled to show freedom from error on appeal? Why should a respondent be compelled to show that the admission or rejection of certain evidence was not error, or if error that it was harmless? Let the appellant who claims the error show the same, and let him show further that but for the error the verdict would in all probability have been otherwise.

Mr. Justice Ingraham in testifying before the Laws Delay Commission said: "There will be page after page of discussion about questions of evidence, a question which, as I understand it, would be hardly considered in an English court, and if there is any error in a ruling on evidence the appellate court, under the rulings which have been established in this State, is bound to reverse. In regard to criminal cases a system has been established . . . which is constantly enforced in the appellate courts,

and which I have never heard of being criticised in any way; that is, before a judgment is reversed the appellant is bound to show that the error complained of was an injury to the defeated party; he is bound to show that but for the error the result would probably have been different."

"Q. Is it not so in civil cases?

"A. I know it is not so; where there is an error of any consequence it has to be reversed.

"Q. No matter whether the court is of the opinion that it was immaterial?

"A. The Court of Appeals has said time and time again that unless it was absolutely certain that it could not be material it should be reversed. We, of course, have to follow their directions. . . .

"Q. You think that the rule in criminal cases should be extended to civil cases?

"A. I think it would be decidedly an advantage to administrators of justice and to justice. I think it would minimize the importance of bothering with questions on the trial. It would take up very much less time to try a case if counsel knew that petty questions would not upset the verdict."

We suggest that much of the law's delay is caused by the inability of attorneys to follow the plain and simple provisions of the Code of Civil Procedure. In the first place an attorney commencing an action fails to ascertain precisely what is necessary to constitute the cause of action, and without investigation draws a complaint containing many allegations, some of which are either immaterial or mere evidence of facts otherwise alleged, and he is likely to omit the one allegation essential to the maintenance of his cause of action. The attorney for the defendant promptly takes advantage of the situation, and the result is that the trial of the cause is delayed. A few hours' investigation into the law governing the case, before drawing the complaint, would have prevented all this delay.

On the other hand, a complaint is taken to an attorney with a request that he draw an answer. After receiving the defendant's statement and without ascertaining what he may prove under a general denial, he begins to dictate folio after folio of admissions (which form no part of an answer, as it is sufficient to refrain from denying) and so-called defenses, and closes with a sweeping denial of every allegation of the complaint not "hereinbefore specifically denied, admitted, qualified, explained or affected." In the end he has an answer covering some ten or fifteen typewritten pages, when in all probability the whole answer, if scientifically drawn, would not have covered more than one page. And as is too often the case, the whole thing is an unintelligible and meaningless mass of verbosity. Of course, the plaintiff interposes the usual motions for the correction of the pleading, thereby delaying the trial of the cause. And in this case a few hours' investigation before drawing the answer would have enabled the attorney to present a scientific answer about which no question could arise. Why attorneys will persistently ignore the plain and simple provisions of the Code, is one of the things about law and lawyers that is not explainable.

A. I. ROSBROOK.

IT is a public scandal when the law is forced to uphold a dishonest act. Lord Macnaghten, Nordenfelt *v.* Maxim Nordenfelt, &c. Co., (1894) L. R. App. Ca. Part 5, p. 573.

USE OF INTOXICATING LIQUORS BY JURORS AS GROUND FOR NEW TRIAL.

FOR certain irregularities in "high finance" a New York capitalist was recently convicted in a federal court and sentenced to imprisonment for fifteen years. An application for new trial on the ground that the jurors drank intoxicating liquor was made, and is pending at the time of writing (Dec. 15). In some of the States a distinction is made between such indulgences by jurors during the trial, while the jurors are free to go where they please, and indulgences after the case has been finally submitted to them for consideration; the latter being considered ground for a new trial, and not the former. Drinking of intoxicating liquors by jurors, at their own expense, is not usually held to be a ground for new trial unless there is reason to suspect that their judgment was in some degree affected thereby. The latest collection of authorities on these and related points will be found in the annotation to an Oklahoma case in 10 Ann. Cas. 889. In the following article we lean toward the view that new trials should not be denied in criminal cases solely because of a supposed distinction between the use of liquors while the case is on trial and their use after it has been submitted for a verdict; and we also contend that courts ought to be extremely lenient in the exaction of proof that a juror's draughts of liquor were more copious than a wise judge should tolerate.

Slight intoxication causes increased activity of the circulation and of nervous and mental processes, says the New International Encyclopædia (title "Intoxication"). However, Moses protested to the Lord that he was "slow of speech, and of a slow tongue" (Exod. 4: 10), but was not advised that his impediment should be removed by resort to the wineglass. There is such a thing as being too shrewd; enlivened faculties may perceive materiality in facts that are really unimportant, especially if the man has great confidence in his own astuteness.

> To observations which ourselves we make,
> We grow more partial for th' observer's sake.
>
> POPE, *Moral Essays*, Epistle I.

Vanity, obstinacy, and most other foibles against which a conscientious and level-headed juror would scrupulously guard himself are apt to be magnified by a little alcohol. It is not necessary that a man shall be visibly affected by the liquor he drinks, in order to vitiate the final expression of his judgment as a juror. A telephone wire may carry a vagrant electric current as deadly as a blinding bolt of lightning.

> There's nought, no doubt, so much the spirit calms
> As rum and true religion.
>
> BYRON, *Don Juan*, Canto II., stanza 34.

But however much a man's serenity may advance the welfare of his soul, it would not be desirable that, when he is sitting as a juror, his spirit should be subdued by a single quaff of alcoholic liquor. It is an occasion when the spirit of combativeness against a proposed verdict — especially a verdict of guilty — may be manifested with the utmost propriety and ought not to be artificially placated.

Every one knows that in the heat of debate very warm exchanges of opinion and of personalities sometimes occur in the jury room. Isn't it clearly correct to say that a party in a case is entitled to the benefit of *every* faculty of every juror, by whatever name it may be termed? For instance, if a little liquor deprives a juror of tact, so that in the course of discussion he offends a juror of delicate sensibilities, who thereafter refuses to give respectful consideration to anything urged by the offending juror, the interests of justice are *prima facie* materially affected; because freedom of debate in the jury room, unrestrained by anything but gentlemanly deportment, is a matter of vital consequence. When rum comes in at the door, good manners are apt to fly out at the window, and this may

happen with resulting friction between jurors continued to the very end of the case, as well when "hell broth" appears between sessions of the trial as after the case is submitted to the jury.

In *Ford* v. *Umatilla County*, 15 Ore. 313, 320, Judge Thayer conceded that a man "might be inclined to be more credulous" when under the influence of intoxicating liquor. Surely, if anything of an illegitimate nature has excited to an abnormal degree a juror's inclination to believe testimony against an accused person, the court ought to have a strong disposition to grant a new trial; for Bentham says in his "Rationale of Judicial Evidence:" "Among mankind at large the general propensity is to give to evidence too much rather than too little credence;" and Chancellor Spragge of Ontario said: "There is a proneness with some, at any rate, . . . to give overmuch weight to oral testimony, and too little weight to conduct and circumstances." *Day* v. *Brown*, 18 Grant Ch. (U. C.) 682, 683.

On a trial that has consumed a fortnight or more in the taking of testimony it is a matter of prime importance that jurors shall be able to recollect what the witnesses have said, as far as the normal faculties will permit. It is not customary to allow jurors to take to the jury room a copy of testimony that the stenographer has made for the judge and counsel. "With most men no faculty is more treacherous than memory." (*Carey* v. *Jones*, 8 Ga. 516, 519, *per* Nisbet, J.) And recollection of the exact expressions used by a witness is notoriously untrustworthy. "I have never heard a witness, in twenty years, who could give any man's evidence in his precise words," said Chief Justice Birchard of Ohio. "I never saw an attorney who could pretend to state the precise words of a witness six hours after his testimony had been given." (*Wagers* v. *Dickey*, 17 Ohio 439, 49 Am. Dec. 467.) Ability to recall the testimony given is needed at all stages of the trial for intelligent and contemporaneous comprehension of subsequent testimony as it comes from the witnesses (see *Brown* v. *State*, 137 Ind. 240, 243, 45 Am. St. Rep. 180); and if that necessity is ignored in the distinction made by some courts between the use of intoxicating beverages while the trial is progressing, and their use while the jurors are finally deliberating on their verdict, the distinction is in our opinion utterly unsound.

Q. Was there anything in the shape of oath, promise, or obligation at that meeting? *A.* As I had got spirits before going there, and while there, I do not recollect what was said or done at the meeting of the first of January. I dare not say anything concerning it. I am not very sure.

Q. Do you mean to say you were so drunk that you could not remember? *A.* I do not mean to say that I was drunk. There are different degrees in which persons may be the worse of liquor. I have seen some persons who cannot go, others who cannot speak, and some who can do both but do not afterwards recollect what happened in their presence.

Still another witness:

Q. What were the circumstances that happened through the day? *A.* Being the first of January, I had got some liquor through the day.

Q. Did it affect your memory? *A.* I could not take upon me to speak with certainty as to that night. (Examination of witnesses as reported in *Rex* v. *McKinley*, 33 How. St. Tr. 600, 610, 626.)

A juror should not only be continually alert to hear and understand all that the witnesses utter, but his attention to the demeanor of the witnesses should not flag. The countenance of a witness whose testimony is to be carefully weighed ought to be narrowly watched. "People can say what they will, but they cannot look just as they will; and their looks frequently discover what their words are calculated to conceal," wrote Lord Chesterfield to his son. (Letter CVIII. To the same effect see Letter CLXVI.) "When Demas invited Christian and Hopeful to turn aside to the silver mine, 'Is not the place dangerous? Hath it not hindered many in their pilgrimage?' asked Christian. 'Not very dangerous,' replied Demas, 'except to those that are careless;' but withal he *blushed* as he spake." (Bunyan's Pilgrim's Progress.) "It was indeed pitiful to see the confusion and shame on the poor fellow's face as he tried to deny or explain his former utterances," said Judge Deady in *The City of Carlisle*, 39 Fed. Rep. 807, 809. In a criminal case in Indiana a new trial was granted upon proof that the eyesight of one of the jurors was so defective that he was unable to distinguish one from another of the faces of the witnesses. (*Rhodes* v. *State*, 128 Ind. 189, 27 N. E. Rep. 866.) A moderate amount of hot and rebellious liquor in the blood might be responsible for exactly the degree of aberrancy that would make a juror overlook a significant expression on the witness's face — prevent him from observing, for example, a glance of contempt or rage bestowed by a spouse upon his or her meek and humble mate while the former was testifying in a divorce case, which might be a strong piece of evidence in locating the blame for domestic infelicities.

Ribot, a French psychologist, who made a special study of the mechanism of attention, maintains that an intoxicated person is incapable of exerting voluntary attention. (Psychology of Attention, chap. iii.) Marked derangement of that function may be caused by an almost imperceptible disturbance of mental poise, as we are instructed by observation of our fellow men. In conversation with a man whose natural torpidity has been at all antidoted by liquor, there is likely to be noticeable difficulty in restraining his attention from wandering and "sidetracking."

In a contested election case in Kentucky, the court decided that the officers honestly failed to count all the votes that were cast for the contestant. This conclusion was reached partly, among other reasons, because such officers are "usually weary with the duties of the day when the count commences," and partly because "there was a quart bottle of wine in the room where the election was held, and it was to some extent drunk by the officers;" and "assuming, as we do," that they did not intoxicate themselves, said the court, "yet . . . the weight which we would otherwise feel was due the result of their official labors is materially lessened." (*McEwen* v. *Cary*, (Ky. 190 96 S. W. Rep. 850, *per* Barker, J.) Should not similar accessories to a verdict upon which a fifteen years' sentence is founded sustain inferences equally prejudicial to its validity? Is an election to the office of county clerk a more delicate matter than the condemnation of a man to fifteen years of servitude?

In a very late case the Circuit Court of Appeals for the First Circuit held that it is unquestionably proper to ask a witness on cross-examination "whether he had been drinking on the day of the trial." *Armour* v. *Skene*, 153 Fed. Rep. 241, 82 C. C. A. 385. There was no contention that the witness was intoxicated. But the probability that he had *some* liquor in his belly was deemed a relevant fact in weighing his testimony. *A fortiori* should it be considered an awakening circumstance when a convivial juror's verdict is weighed in the judicial scales.

In a late case in the federal District Court (affirmed *per cur.* by the C. C. A. on the opinion of the district judge) the court, speaking of the testimony of members of the Pilot Association, said: "It has more than once happened that, when testifying, the witness has been noticeably affected by drink, and I am not infrequently obliged, in order to get at the real facts, to refuse to accept what they testify to." (*The Acilia*, 120 Fed. Rep. 455, 56 C. C. A. 605.) Observe that the court does not say the witness was drunk, or even intoxicated. Must a court be satisfied with the judgment of a juror who *may* have been "noticeably affected by drink"?

In very many cases courts have discussed the weight to which the instinct of self-preservation is entitled, in determining whether a person accidentally killed was guilty of contributory negligence. According to the prevailing doctrine, although

this instinct gives rise to a presumption of due care that has a surer foundation than almost any other presumption based on human feelings and experience, it should not be considered at all if eyewitnesses testify to the circumstances attending the fatality. (Moore on Facts, § 555, notes 89, 90.) And if it were shown that a traveler had partaken rather freely of intoxicating liquor, any presumption that consideration of safety would deter him from trying to cross a railroad track in competition with a moving train would probably be effectually rebutted. As was said in an Illinois case, "his failure to observe the train was from mere inattention, which may fairly be attributed to his intoxication, and this would account for his rashness and recklessness in driving in front of a train, thereby voluntarily incurring a danger such as would bring a shudder to the bravest man when in the possession of his sober senses." *Wabash, etc., R. Co.* v. *Weisbeck*, 14 Ill. App. 525, 529, *per* Wall, P. J.

> Inspiring, bold John Barleycorn,
> What dangers thou canst make us scorn!
> BURNS, *Tam O'Shanter*.

Until they were credibly informed to the contrary, Russian soldiers at Balaklava attributed the charge of the Light Brigade to King Rum, and were surprised to find that the canteens of the prisoners were not empty. (Kinglake, "The Invasion of the Crimea," *in loco.*) Many men are killed at railroad crossings, not because they are deliberately reckless, but for the reason that they are lost in reverie; or, above all, perceiving an approaching train they miscalculate its speed or distance. (Moore on Facts, § 558.) If courts take judicial notice that a man's good judgment whereby he preserves life or limbs, is presumptively impaired by the presence of rum in his body, by parity of reasoning they should infer danger to the life or liberty of a man accused of crime if liquor has laid siege to the judgment of his jurors, even though the latter are far from being drunk.

Verdicts are frequently sustained despite the improper admission of evidence or the giving of erroneous instructions, the court being convinced that the jurors arrived at a clearly correct conclusion on the whole case. But in all those cases the verdict received the unanimous assent of the jurors. A witness may be perceptibly under the influence of liquor while testifying, and yet the testimony of other and sober witnesses may amply suffice to determine the questions at issue. But a crapulous juror cannot thus be ignored. His intelligent assent to the judgment of his associates is indispensable, or else the verdict is not that of a constitutional jury. (See *Patrick* v. *Victor Knitting Mills Co.*, 37 N. Y. App. Div. 7.) Hence it seems to us the use of intoxicants by jurors should be regarded by reviewing judges with the utmost jealousy. When a plain constitutional right of a defendant in a criminal case has been violated, judges whose opinions always carried great weight with the legal profession have declared that the question whether the defendant was actually prejudiced will not be investigated. It will be assumed that the right could not be disregarded without prejudice; or the court refuses to condescend, as it were — if one chooses to express it that way, as Chief Justice Cooley did — to spend time in an inquiry demanding that a positive constitutional mandate adopted for the protection of life or liberty shall possibly be suspended. For example, imagine a judge pausing to consider whether a punishment manifestly "cruel or unusual" was or was not *very* cruel! If a grand jury investigating an accusation of crime should compel the accused to testify, we do not believe a judge would care to scrutinize his testimony closely before quashing an indictment against him. We incline to the opinion that when a man is charged with the commission of a crime meriting imprisonment for fifteen years of the most valuable part of his life on a verdict of guilty, it ought not to make a very substantial difference whether one of his constitutional rights was infringed in obtaining a conviction or whether members of the jury were guilty of conduct that leaves the integrity of their verdict, as that of twelve concurring and rational minds, open to reasonable doubt. The judge knows, let us assume, that one or more of the jurors have indulged in spirituous liquors solely to gratify their appetites, and not for a medicinal purpose sanctioned by a physician. The judge does not know precisely to what extent, if any, this indulgence promoted a verdict of guilty. But mankind in general prefer to govern their actions by what they do know rather than by what they do not know.

"Intoxication affects different men in different ways; it largely depends upon the kind of man and liquor." (*Texarkana, etc., R. Co.* v. *Frugia*, (Tex. Civ. App. 1906) 96 S. W. Rep. 563, 565, *per* Neill, J.) Drink and guilt made Macbeth "brain-sickly." But Lady Macbeth said her potation "hath made me bold:"

> Infirm of purpose!
> Give me the daggers:
> *Macbeth*, Act II., sc. 2.

In *Fleming* v. *State*, 5 Humph. (Tenn.) 564, Reese, J., said: "The operation of ardent spirits is very different on different constitutions." And undoubtedly when taken on an empty stomach they may, far more readily than when the stomach is full, "ascend me into the brain," and assail some faculties that a juror in a complicated case ought to preserve in the acme of vigor. In a New York case the court speaks of "the immediate effects of wine or spirits upon a nervous or sensitive organization." (*Estate of Gross*, 7 N. Y. St. Rep. 748, *per* Surrogate Rollins.) Now, when a court knows that a juror has imbibed liquor unnecessarily will it stoop to listen to evidence that he does or does not possess a "nervous or sensitive organization" or this or that sort of a "constitution," or attempt to ascertain the condition of his stomach? "It is but too true that it [liquor] will make a man bold and reckless, not only of consequences, personally, but also of the rights of those whose life and most valuable interests, property, and reputation, are at stake; and its effect is so very different on different men that it would be dangerous in the extreme to attempt to lay down any rule by which it could or should be determined whether a juror had drank too much or not, and the only safe rule is to exclude it entirely." *Jones* v. *State*, 13 Tex. 168, 182, *per* Lipscomb, J.

Is it not at least indiscreet nowadays for a juror, in an important criminal case, to allow himself to drink intoxicating liquors without any supposed necessity? Would not the majority of men whose judgments are deemed good enough to have the liberty of their fellow men confided to them feel that there is signal propriety and decency in total abstinence from alcoholic liquors on such an occasion? And if a juror was willing to brave public sentiment in that particular — and unquestionably it would be very strong sentiment in some communities — or his own self-respect gave him no admonition, does it not justify a suspicion that his thirst for stimulants was somewhat fierce and abundantly matched his capacity to quench it without menace to his intellectual competency?

It is to be borne in mind that when a verdict is attacked for alleged misconduct of jurors their testimony in support of it must be regarded as that of biased witnesses. It would not be scientific to doubt a juror's positive testimony to the quantity of liquor he consumed. But it would violate a cardinal rule for weighing testimony to accept without distrust his opinion that liquor admitted to have been taken did not to any extent affect his memory or misunderstanding. (Moore on Facts, § 1092.) And it seems to be a trait in human nature, or an example of not seeing one's self as others see him, for a man to deny intoxication unless it is gross. In a case where a plaintiff denied having been drunk, "we notice that many people do that who

have been drunk," said the court; "perhaps this is because they really think they were not as drunk as they appeared to others, and in fact were." (*Louisville, etc., R. Co.* v. *Deason,* (Ky. 1906) 96 S. W. Rep. 1115, *per* O'Rear, J.) In Lord Macaulay's Journal and Letters there are many allusions to the pleasant dinners at the Literary Club, founded in the time of Johnson, Boswell, Garrick, Burke, and others, and of which Macaulay long afterward became a member. "I was amused," he writes, on his first introduction to it, "in turning over the records of the club, to come to poor Bozzy's signature, evidently affixed when he was too drunk to guide his pen." (Sir George Trevelyan's Life and Letters of Lord Macaulay, *in loco.*) It is well known that the immortal biographer of Johnson was addicted to excessive drinking. And yet he would probably have resented an accusation that he was drunk on the occasion referred to by Macauley; for in a letter to his lifelong friend, Rev. William Johnson Temple, recently published, wherein he referred to a jovial company with whom he had lately dined, Boswell said: "I did not get drunk. I was, however, intoxicated." So, too, in the southern latitude of this country the fact that a man became somewhat intoxicated is not supposed to be observed by his host or associate, or at least does not dwell in the memory of his friends. Perhaps the same social amenities would operate upon jurors, apart from natural bias in favor of their verdict, and persuade them, contrary to the truth, that none of their number exceeded the bounds of moderation or appeared to have done so.

CHARLES C. MOORE.

MR. JUSTICE LURTON.

JUDGE HORACE H. LURTON of Nashville, Tenn., the new associate justice of the United States Supreme Court, was born in Newport, Campbell county, Ky., Feb. 26, 1844, the son of Lycurgus B. and Susan Ann Harmon Lurton, natives of the Blue Grass State. His father was, till 1870, a physician, but at that time was ordained a minister in the Protestant Episcopal Church.

Judge Lurton, in 1859, entered Douglass University, now the University of Chicago, but after a brief academic career he left the university to enter the Thirty-fifth Tennessee regiment, commanded by Col. B. J. Hill, being made sergeant-major. He was taken a prisoner in the battle of Fort Donelson and confined in Camp Chase. He escaped, however, and in 1862 enlisted in the Third Kentucky Cavalry, serving with them until July, 1863, when he was taken prisoner in Ohio on Morgan's famous raid.

In 1867 Judge Lurton graduated from the law department of Cumberland University, Lebanon, Tenn., and began the practice of law in Clarksville in that State, having as a partner Gustavus A. Henry, a kinsman of Patrick Henry. Later he associated himself with James E. Bailey, subsequently a United States senator.

In 1875 Judge Lurton became a chancellor of the Sixth Chancery Division of Tennessee by appointment of the governor, and one year later was elected to the position; but in 1878 he resigned to resume the practice of law at Clarksville, with Charles G. Smith as a partner. There he remained till 1886, busily engaged in his professional work and incidentally acquiring a reputation as a financier on account of his being the president of a bank. In 1886 he was elected a justice of the Supreme Court of Tennessee, and in 1893 became its chief justice. In the same year, however, President Cleveland appointed him a judge of the Sixth Judicial Circuit Court of Appeals, to succeed Judge Howell E. Jackson, who had been appointed an associate justice of the United States Supreme bench. He has been on the federal bench ever since.

Judge Lurton served as vestryman of Trinity Church in Clarksville for many years, and since 1882 has been a trustee of the University of the South, at Sewanee, Tenn., from which university he holds the honorary degree of doctor of civil laws. He has also been connected with the law department of Vanderbilt University in the capacity of a teacher of constitutional law and jurisdiction of the United States courts.

In 1908 Judge Lurton became a member of the board of consulting editors of the American and English Encyclopædia of Law and Practice.

President Taft, when a United States circuit judge, sat on the same bench with Judge Lurton, and in 1906, when a vacancy occurred in the United States Supreme Court, recommended Judge Lurton for the position; but President Roosevelt named instead his Attorney-General, William H. Moody. Now President Taft has taken the first opportunity to do what he wanted President Roosevelt to do.

THE LATE SIR HENRI TASCHEREAU.

IN the death of Sir Henri T. Taschereau, LL.D., Chief Justice of the Province of Quebec, on October 11, the board of consulting editors of the American and English Encyclopædia of Law and Practice lost its second distinguished member within a year, Hon. William Wirt Howe having died in March last.

In view of the fact that both his father and grandfather were judges and that he came of one of the most distinguished of French Canadian families, it is not surprising that Sir Henri Taschereau should have been one of Canada's foremost jurists and most prominent citizens.

He was the son of Jean Thomas Taschereau, judge of the Supreme Court of Canada; and he was the grandson of another Jean Thomas Taschereau, who was a member of the first legislative assembly of Canada, who did good service in defense of the country against the Americans in 1812, and who was also a distinguished judge. The founder of the family in Canada was Jacques Taschereau, of Touraine, who emigrated to Quebec in 1725, as secretary of Intendant Dupuy. Since then five generations of brave soldiers, distinguished citizens, noble churchmen, and honorable jurists have done their share of work first for Canada and then for the Empire. The Honorable Gabriel Elzear Taschereau, the son of the secretary, was, while very young, one of the soldiers who fought against Wolfe on the Plains of Abraham in 1759. Later on, in 1775, being then a British subject, he was one of the best soldiers of Canada against the American army. He died a colonel of the Quebec militia. This man was the great-grandfather of the late chief justice.

Sir Henri Taschereau was born in 1841, and was educated at the Quebec Seminary and Laval University, and was called to the bar in 1863. For a time he was an alderman of Quebec, and represented the city on the North Shore Railway Board for four years. From 1872 to 1878 he represented Montmagny in the Dominion Parliament in the Liberal interest. In the latter year he was elevated to the Court of King's Bench in the province of Quebec, and two years ago became chief justice. Last year the honor of knighthood was conferred upon him. In 1864 he married a daughter of the late Mr. E. L. Pacaud, of Arthabaskaville, and two years after her death, in 1883, he took his second wife, the widow of Mr. Henri Masson, of Montreal.

The late chief justice died at Montmorency, France, while on a visit to his daughter, Mrs. Lyon. His body was brought back to Canada for burial.

Cases of Interest.

DUTY OF RAILROAD TO CARRY PREACHER AT CUSTOMARY CLERGY RATES. — In Illinois Central R. Co. *v.* Dunnigan, 50 So. Rep. 443, the Supreme Court of Mississippi holds that the fact that a railroad company permits ministers of the gospel to travel on its road at a rate lower than that given the general public is a mere gratuity which the company can withhold at its pleasure, and that even a custom to give ministers a lower rate imposes no obligation to allow such rate in a certain instance. The action was one for damages brought by a colored preacher who had been refused passage at the reduced rates customarily allowed clergymen.

PUBLIC DRINKING FOUNTAIN FOR HORSES AS GIFT TO CHARITIES EXEMPT FROM INHERITANCE TAX. — In *In re* Graves's Estate, 89 N. E. Rep. 672, the Illinois Supreme Court held that a testamentary gift of a sum of money to the park commissioners of a city for the erection of a public drinking fountain or basin for horses, and in connection therewith the erection of a bronze statue of a certain horse, was a gift for charitable purposes and as such exempt from taxation under the Illinois Inheritance Tax Law. The charitable nature of the bequest was held to arise both from the statue, which would add beauty and attractiveness to the park in which it was to be located, and contribute to the pleasure of the public, and from the drinking basin which would add to the comfort of dumb animals.

LIABILITY FOR INJURIES CAUSED BY BROKEN LIVE WIRE KNOCKED AGAINST PLAINTIFF BY THIRD PARTY. — In Seith *v.* Commonwealth Electric Co., 89 N. E. Rep. 425, the Illinois Supreme Court reversed a judgment for the plaintiff for injuries caused by contact with a live wire under the following circumstances: The wire, which was an electric light wire in a street of Chicago, broke and fell into the street and lay between the sidewalk and the roadway. As the plaintiff was passing on the sidewalk, a policeman who stood by the wire struck it with his club and threw it against the plaintiff with the injurious consequences complained of. It was held that the act of the policeman which the defendant could not be expected to anticipate was the proximate cause of the accident, and not the defendant's original negligence in hanging the wire. Vickers and Carter, JJ., dissent.

DEATH PENDING APPEAL FROM CONVICTION AS ABATEMENT PREVENTING FORFEITURE OF INSURANCE. — The St. Louis Court of Appeals held in Baker *v.* Modern Woodmen of America, 121 S. W. 794, which was an action on the insurance certificate of the defendant fraternal society, that although such certificate and the by-laws of the society provided that the certificate should be void in case the insured should be convicted of a felony, a recovery could be had on the certificate where the insured was tried and found guilty of a felony and sentenced to imprisonment, and after having been granted an appeal and having furnished a supersedeas bond suspending the enforcement of the judgment and sentence, died pending the determination of the appeal by the Supreme Court. His death at this stage of the proceedings was held to abate not only the appeal but the entire prosecution, and to leave the cause as though no prosecution had ever been commenced against him.

SALE OF LAND UNDER DECREE OF COURT OF ANOTHER STATE AS AFFECTED BY FULL FAITH AND CREDIT CLAUSE. — In Fall *v.* Eastin, 30 Sup. Ct. Rep. 4, the United States Supreme Court holds that a deed to land situated in the State of Nebraska, made by a commissioner acting under the decree of a court of the State of Washington in an action for divorce in which, in determining the equities of the parties, the land was set apart to the wife as her own separate property and a conveyance thereof to her decreed, is not binding on the courts of Nebraska under the full faith and credit clause of the Federal Constitution. The view which the court adopts recognizes the policy of the State of Nebraska and the mobility of the court of Washington, by its decree alone or the deed executed through the commissioner, to convey the land situated in Nebraska. Mr. Justice Harlan and Mr. Justice Brewer dissent.

LIABILITY OF CARRIER FOR MENTAL SUFFERING AND ILLNESS OF WHITE PERSON CAUSED BY PRESENCE OF NEGROES. — In Morris *v.* Southern Railway Co., 65 S. E. Rep. 956, the South Carolina Supreme Court held that the defendant railway company was not liable, under the facts shown, for the mental suffering and illness of a white woman caused by the seating of disorderly negroes in the car for white persons and near to where she was seated. The statute of the State requires negroes and white persons to be carried in separate coaches, but provides that when the coach for a certain race is full, and another car cannot be procured, the overflow may be placed in the car of the other race. The coach for negroes was full, and others of that race upon boarding the train were seated in the car for white persons near to the plaintiff. It appeared that she was a delicate woman, afflicted with heart trouble, and became frightened at the conduct of the negroes, who were drinking and cursing, and in consequence she became ill. The conductor was not aware of the disorderly conduct on the part of the negroes, and no complaint was made to him. A recovery was denied.

FIRE AS "HOSTILE" OR "FRIENDLY" WITHIN INSURANCE POLICY. — Whether a fire is what is termed "hostile" as distinguished from "friendly" so as to authorize a recovery under an insurance policy "against all direct loss and damage by fire" was the question before the Wisconsin Supreme Court in O'Connor *v.* Queen Insurance Co. of America, 122 N. W. Rep. 1038. It appeared that the plaintiff lived in a rented house heated by a furnace. His servant built a fire in the furnace of material not suitable for use therein, and of so highly inflammable a character as to cause intense heat and great volumes of smoke to escape through the registers leading into the rooms, and greatly damaged the plaintiff's property. The heat was so intense as to char and injure furniture, and the smoke and soot greatly injured the furnishings and personal property of the plaintiff. It did not appear that there was any ignition outside of the furnace. The court held that as the fire was extraordinary and unsuitable for the purpose intended, and in a measure uncontrollable, it was "hostile" and within the contemplation of the policy.

RIGHT OF EXPRESS COMPANY TO ENJOIN OMISSION OF ITS NAME FROM EXPRESS COMPANY DIRECTORY. — In Davis *v.* New England Ry. Publishing Co., 89 N. E. Rep. 565, the Supreme Judicial Court of Massachusetts hold that the plaintiff as proprietor of the Northern Express Company, which carries merchandise between Boston and many cities and towns in Massachusetts, Maine, and New Hampshire, is entitled to an injunction to prevent the omission of the name of that company from an express company directory circulating in the city of Boston and purporting to give the public a full list of all the reputable local express companies doing business in that city and vicinity. The ground on which the plaintiff is granted relief is not that he has the right to compel the defendants to do anything for his benefit, but that he has a right to have them refrain from intentionally doing anything, without legal justification, to his injury. The publication of the directory, omitting the plaintiff's company, is held to be false and misleading to the plaintiff's injury and to cause an irreparable injury not accurately measurable in damages and requiring equitable relief.

LIABILITY OF VENDOR FOR INJURIES CAUSED BY EXPLOSIVE LEFT IN PURCHASED BUILDING. — In Finkheiner *v.* Solomon, 74 Atl. Rep. 170, heard in the Pennsylvania Supreme Court, it appeared that the plaintiff purchased a barn from the defendant. The plaintiff, having no immediate use for the barn, allowed the defendant to keep certain of his effects in it, but subsequently notified the defendant that he needed the building, whereupon the defendant removed the greater part of his belongings, leaving only a few small things. Soon thereafter the son of the plaintiff, who was about nine years old, was playing in the barn with some other children and found some dynamite caps left by the defendant in a box placed on a beam in the barn, and not knowing their dangerous qualities began to experiment with one of them, and in attempting to drive a nail through it caused it to explode and injure him. In the action by the plaintiff to recover for the alleged negligence of the defendant in leaving the caps in the barn the court held that the conduct of the defendant was not in itself negligent, and that the plaintiff, after gaining possession of the building, should have inspected it and looked out for anything that might be dangerous before permitting his children to use it. The causal connection between the act of the defendant and the injury was deemed to be too remote to authorize a recovery.

CONSTRUCTION OF STATUTE PROHIBITING THE "KEEPING ON HAND" OF LIQUOR. — In Cohen *v.* State, 65 S. E. Rep. 1096, the Georgia Court of Appeals holds that the statute of that State providing that it shall be unlawful for any person to "keep on hand" at his place of business any intoxicating liquor makes it a crime to keep liquors at such place for any purpose whatever, and that in a prosecution under the statute evidence of the purpose for which the defendant had the liquor is irrelevant and inadmissible. The explanation offered by the defendant was that he had the liquor at his place of business merely for safe-keeping until the night of his daughter's wedding. Justice Russell, without saying that this particular defense was sufficient, dissents as to the construction placed on the statute and expresses his view as follows: "To my mind the words 'on hand' import a continuous keeping for the purpose of convenient use at the place of business under consideration, a use of the same general character as that of other objects kept at the place of business, a use ancillary to the business. But I do not conceive that one who temporarily keeps the wines of his neighbor, whose nearby dwelling house has been destroyed by fire, until his neighbor can rent another house and remove to it, although he keeps them in a spirit of neighborly kindness for that temporary purpose, would be guilty of keeping wines on hand at his place of business. . . . I do not think that proof that intoxicating liquors were kept raises the presumption that they were 'kept on hand.'"

TRADEMARK "HOLEPROOF" AS FALSE REPRESENTATION PREVENTING REDRESS FOR INFRINGEMENT. — In Holeproof Hosiery Co. *v.* Wallach Bros., 172 Fed. Rep. 859, the complainant, as manufacturer of hosiery under the name of "Holeproof," sought to enjoin as an infringement of its trade name the use of the name "Knotair" to designate hosiery manufactured by defendants. One defense was that the complainant had no standing in a court of equity, because the name "Holeproof" adopted by the complainant was false and misleading, just as the name "Syrup of Figs" when applied to a preparation not containing syrup of figs was a misrepresentation defeating any right of the proprietor to equitable relief against infringement. The Circuit Court of Appeals of the Second Circuit dismisses this contention and says: "No one surely could be misled into the belief that holes will not appear in complainant's socks if they are worn long enough, and it is difficult to conceive that any one could be fatuous enough to suppose that by the use of such a word he could deceive people by inducing a belief that the goods to which it was applied would never wear out. It is a boastful and fanciful word, easily to be distinguished from the 'Syrup of Figs' and similar cases where the name or description involved misstatements as to the manufacture of the advertised product." The court held, however, that the name "Knotair" is not an infringement of the name "Holeproof."

SELDEN PATENT HELD VALID AND INFRINGED. — In Electric Vehicle Co. *v.* C. A. Duerr & Co., 172 Fed. Rep. 923, District Judge Hough, sitting in the United States Circuit Court for the Southern District of New York, holds that the patent of George B. Selden, applied for in 1879 and granted in 1895, of an automobile propelled by a "liquid hydrocarbon gas engine of the compression type," is a valid pioneer patent which is infringed by the defendants who are makers and dealers in gas propelled automobiles. The claim of Selden and his licensees is not that Selden invented any new machine or combination of matter in the same sense that Whitney invented the cotton gin or Howe the sewing machine, or that he has invented a single mechanical device for which a prototype could not be found, for prior to 1879 there were running gears, propelling wheels, steering mechanisms, gas engines, etc., of many forms; but they do claim that he selected, adapted, modified, co-ordinated, and organized those enumerated parts, including the usual mechanical adjuncts of each part, into a harmonious whole so as to produce a self-propelled road vehicle with a considerable radius of action over ordinary highways, and capable of management by a single driver, and he not necessarily a skilled engineer, and that such a vehicle had no practical existence prior to the application for his patent, and that after thirty years no gasoline motor car has been produced that does not depend for success on a selection and organization of parts identical with or equivalent to that made by him in 1879. This claim the court sustains, holding that the state of the art at the time of this invention left room for a pioneer patent such as Selden's. It is held that at this time it was the right of Selden or any one else to appropriate as one of the elements of a patentable combination a liquid hydrocarbon gas engine of the compression type, and it is found as a fact that although at this date there were many such engines, there was not one which in its then form could be made an element in a road wagon combination on account of the great weight of the engine in porportion to the horse power developed, and that this difficulty Selden solved. But it is upon the new combination of elements that Selden's claim rests. The court says: "Selden's combination cannot be taken apart, and each element recognized as something that had done the same thing or sort of thing before." The car which is the subject of the Selden patent is thus described by the court: "It is a wretchedly poor car for 1905; there were probably as good, if not better, cars in 1895; but it is a marvel of invention for 1879." The effect of the upholding of this patent would seem to be to make all unlicensed manufacturers and dealers in gas-propelled automobiles in this country infringers.

New Books.

EQUITY; ALSO, THE FORMS OF ACTION AT COMMON LAW.

Two Courses of Lectures by F. W. Maitland, LL. D., D. C. L., Late Downing Professor of the Laws of England in the University of Cambridge. Edited by A. H. Chaytor and W. J. Whittaker. G. P. Putnam's Sons, New York City, Publishers, 1909. Price, $4.00.

So great was the genius of this now lamented author that it was impossible for him to touch any legal subject, however simple or however profound, without imparting to it an un-

usual interest and shedding new light upon the history and principles lying at its basis. Those who have learned what to expect when a new book is announced from Professor Maitland's pen will therefore have no reason to be disappointed with the contents of the volume now in our hands. The work in question is a posthumous publication and consequently subject to the imperfection incident to the absence of the author's oversight and revision during the process of publication. However, it must be said that Messrs. Chaytor and Whittaker, the editors, have evidently done their work with much care and fidelity; and it is to be presumed that the material here gathered together is substantially the same in form and substance as it would have been if Professor Maitland himself had given the book to the public. The volume comes from the Cambridge University Press, a sufficient guaranty of the quality of the press work. The contents of the book consist of two different series of lectures; the first comprises twenty-one lectures (293 pages) dealing with Equity; the other comprises seven lectures devoted to the subject of the common-law forms of action (pages 292–386). There is an appendix containing a series of representative writs, illustrating the old common-law forms, taken from ancient sources, chiefly Bracton and Fitzherbert's Natura Brevium. To the whole is added a very complete index, supplemented by an analysis of the contents of the seven lectures on the forms of action.

The part of the book devoted to the subject of equity is a result of Professor Maitland's work, during a period of some eighteen years, as lecturer on that topic in Cambridge University. The purpose, therefore, underlying the mode of treatment adopted by the author is to present the fundamental principles of equity in a true and enlightening but at the same time simple way. That he has succeeded in "making dry bones live" and has made his subject truly intelligible and interesting will appear obvious to any reader who is so fortunate as to peruse these pages. We know of no better way in which to describe the scope and effect of this treatment of Equity than to say that it is as well done in its day as Williams's treatise on Real Property was a generation or two ago; while of course Maitland's lectures have the great advantage, to the present-day reader, of coming from the pen of the greatest historian of our law in any age. The editors speak of the unforgettable charm of manner with which these lectures were delivered — "with all Maitland's gayety," as they put it. One can readily believe that legal learning lay lightly on a mind having such complete and extraordinary mastery over its material.

In the first chapter the author deals with the origin of equity; and one wonders, in reading this introductory matter, whether the historical and philosophic truth concerning the beginning of equity jurisdiction and the place of its doctrines in the law has ever before been as well conceived and truly stated. He makes it entirely plain that equity is not a homogeneous body of doctrines having its own central and pervading ideas and principles, but rather is a large piece of patch-work. Its ideas have nothing special in common except the fact that until lately they were administered only in the court of chancery. In discussing the distinction between the common law and equity, the author gives us the following description of the term "common law": "Already in Edward I.'s day the phrase 'common law' is current. It is a phrase that has been borrowed from the canonists — who used '*jus commune*' to denote the general law of the Catholic Church; it describes that part of the law that is unenacted, non-statutory, that is common to the whole land and to all Englishmen. It is contrasted with statute, with local custom, with royal prerogative. It is not as yet contrasted with equity, for as yet there is no body of rules which bears this name." Then after describing the beginnings of equity jurisdiction, our author goes on to say: "We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system; at every point it presupposed the existence of the common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short act saying 'Equity is hereby abolished,' we might still have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected, and contract would have been enforced. On the other hand, had the legislature said, 'Common law is hereby abolished,' this decree, if obeyed, would have meant anarchy. . . . For this reason, I do not think that any one has expounded or ever will expound equity as a single consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection. . . . One vast appendix was added to property law under the title of trusts. The bond which kept these various appendixes together under the head of Equity was the jurisdictional and procedural bond. That bond is now broken by the Judicature Acts. Instead of it we find a mere historical bond — 'these rules used to be dealt with by the court of chancery' — and the strength of that bond is being diminished year by year. The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice."

In speaking of the procedure of the English court of chancery the author makes the following observation: "This procedure is rather like that of the ecclesiastical courts and the canon law than like that of our old English courts of law. It was in fact borrowed from the ecclesiastical courts; not from their ordinary procedure, but from the summary procedure of those courts introduced for the suppression of heresy." This suggestion that equity procedure came from the summary procedure of the ecclesiastical courts for the suppression of heresy is certainly new to the writer of this review; but we dare say the statement was not made without good authority to sustain it. Professor Langdell of course traces the derivation of equity procedure truly enough from ecclesiastical sources, but did not this particular point escape his attention?

Professor Maitland also has a valuable suggestion or two as to the supposed debt of equity to Roman law, and as one would suppose, the author does not think that this debt is a very big one. Says he: "Nor do I believe that to any very large extent the chancellors had borrowed from the Roman law. . . . No doubt through the medium of the canon law these great ecclesiastics were familiar with some of the great maxims which occur in the Insitutes or the Digest. One of the parts of the Corpus Juris Canonici, the Liber Sixtus, ends with a bouquet of these high-sounding maxims — *Qui prior est tempore potior est jure,* and so forth, maxims familiar to all readers of equity reports. No doubt the early chancellors knew these and valued them — but I do not believe that we ought to attribute to them much knowledge of Roman law or any intention to Romanize the law of England. For example, to my mind the comparison sometimes drawn between the so-called double ownership of England and the so-called double ownership of Roman law cannot be carried below the surface. In their treatment of uses or trusts the chancellors stick close, marvelously close, to the rules of the common law — they often consult the judges, and the lawyers who pleaded before them were common lawyers, for there was as yet no 'Chancery Bar.' On the whole, my notion is that with the idea of a law of nature in their minds they decided cases without much reference to any written authority, now making use of some analogy drawn

from the common law, and now of some great maxim of jurisprudence which they have borrowed from the canonists or the civilians."

At the close of his introductory chapter the author summarizes the contributions of the court of chancery to our modern system of law as follows: "In my view equity has added to our legal system, together with a number of detached doctrines, one novel and fertile institution, namely, the trust; and three novel and fertile remedies, namely, the decree for specific performance, the injunction, and the judicial administration of estates. Round these, as it seems to me, most of the equitable rules group themselves." Accordingly the subsequent lectures are largely taken up with the discussion of these topics. The treatment of Trusts is quite interesting and exceedingly instructive, but the limits of the present review do not permit us to give an outline of the mode of presentation. The separate chapters on Conversion and Election furnish striking examples of the peculiarly penetrating thought and insight of the author and of his luminous manner of exposition. Has any one before this generalized the doctrine of conversion in the following proposition, or anything like it, which we quote from Professor Maitland — "The equitable doctrine of conversion has its root in this simple principle, that when property has been given to a trustee it must not be in the power of that trustee to alter the devolution of the beneficial interests by committing a breach of trust"?

The explanation given in Lecture X. of the doctrine of tacking makes the doctrine understandable, even if no attempt is made to vindicate the reasonableness and justice of the rule. Says he: "And indeed if courts of equity could begin again they would not carry the doctrine to this extreme. But the view taken seems to be that suggested by the phrase *tabula in naufragio* applied in some of these cases to the legal estate. Y and Z [mortgagees in the case supposed] are both equally honest men; one of them must lose his money — here is a shipwreck — he who can lawfully come by a legal plank may save himself; the fact that Y's equitable right is older than Z's is not a sufficient reason for depriving Z of what he has obtained by his own diligence and the law of the land, namely, a true proprietary right. This doctrine of tacking has fallen out of favor."

The chapters dealing with the nature of equitable estates and interests will be found very valuable to students, as those chapters explain fully and forcibly the fact that legal estates and equitable estates are not rights of one and the same order: "they belong to different orders; the one is a right *in rem*, the other the outcome of an obligation, a trust, and of the rule that trusts can be enforced against those who, when they obtain ownership, know or ought to know of those trusts." Professor Langdell was the first perhaps clearly to expound the true nature of the obligation which equity enforces, and we are indebted to Professor Maitland for bringing that same idea home to our consciousness again in his peculiarly effective way.

In his exposition of the subject of the present relations of law and equity the author emphasizes the fact that this relation is not one of as much conflict and variance as is often supposed; and his observations on the twenty-fifth section of the Judicature Act of 1873, which dealt with the matter of this conflict, are so instructive that we are constrained to quote. The section in question reads as follows: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." Upon this Professor Maitland says: "Now it may well seem to you that those are very important words, for perhaps you may have fancied that at all manner of points there was a conflict between the rules of equity and the rules of the common law. But the clause that I have just read has been in force now for over thirty years, and if you will look at any good commentary upon it you will find that it has done very little — it has been practically without effect. You may indeed find many cases in which some advocate, at loss for other arguments, has appealed to the words of this clause; but you will find very few cases indeed in which that appeal has been successful. . . . It is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. And the first thing we have to observe is that this relation was not one of conflict. Equity had not come to destroy the law, but to fulfil it." We heartily recommend to the student the careful reading of the passages in which the author enlarges on this theme. He will certainly thereby obtain a much better conception of the nature and province of equity than he could possibly have previously entertained.

It should be noted that Professor Maitland is always exceedingly happy in the cases chosen by him to illustrate his text; and it is further observable that nearly all these cases are comparatively late. Of some three hundred cases stated and cited in his book only a very few indeed antedate the period of the beginning of the modern series of Law Reports. Could any better indication be found that the law of equity is largely modern law? The work is all the more valuable to the student from the fact that it presents the doctrines of equity as developed in the latest cases.

The lectures on the common-law forms of action, which form the second part of the volume, will doubtless attract less attention than the preceding portion; but undoubtedly these lectures on the actions will be found to be of value to students and to teachers who may contemplate giving a course on the common-law remedies. The subject-matter of these lectures is not as full and perhaps not practically as useful as the essays on the actions given in Foundations of Legal Liability, vol. 3; but Maitland's lectures cover some topics not treated in the work just referred to, and at any rate he has given us here a very excellent introduction and historical background to the system of common-law remedies. Nearly all that is found here, however, is contained in a more extended form in Pollock and Maitland's History of English Law. The reader will nevertheless feel duly grateful to the editors for incorporating these papers in the volume before us.

News of the Profession.

THE OHIO STATE BAR ASSOCIATION will hold its next annual meeting on July 7, 8, and 9 at Cedar Point. This will be the first time in many years that the meeting has not been held at Put-in-Bay.

ABLE TEXAS LAWYER DEAD. — S. H. Hopkins, who until his health broke down several years ago was regarded as one of ablest of the younger members of the Texas bar, died in San Antonio on November 22, aged thirty-nine.

MADE JUDGE OF MASSACHUSETTS SUPERIOR COURT. — Charles F. Jenney, of Boston, was on November 24 named by Governor Draper to be a justice of the Massachusetts Superior Court, to succeed the late Judge Robert R. Bishop.

KENTUCKY'S OLDEST LAWYER GONE. — Major E. W. Hawkins, aged ninety-five years, the oldest attorney in the State of Kentucky, died at his home in Newport, Ky., on November 12. For seventy-five years he practiced in the Kentucky courts.

APPOINTED TO NEW YORK SUPREME COURT. — On November 26 Governor Hughes appointed Edward B. Whitney a justice of the New York Supreme Court, First Department, to fill the vacancy caused by the resignation of Justice Henry A. Gildersleeve.

NEW MEXICO'S CHIEF JUSTICE BECOMES GOVERNOR. — Chief Justice W. J. Mills, of the New Mexico Supreme Court, has been appointed governor of the territory to succeed George Curry, resigned. Judge William H. Pope, of Roswell, has been made chief justice of the Supreme Court.

MANITOBA'S CHIEF JUSTICE STEPS DOWN. — On November 15 there was a ceremonial assembling of bench and bar in the court house at Winnipeg to bid farewell to Hon. Joseph Dubue, chief justice of Manitoba, who retired from the bench after nearly forty years of continuous judicial service.

NEW FEDERAL JUDGE FOR HAWAII. — On December 7 President Taft sent to the Senate the nomination of Sanford B. Dole, former president of the Hawaiian Islands, to be United States district judge for that territory in succession to Judge George W. Woodruff, resigned.

NEBRASKA STATE BAR ASSOCIATION. — The annual meeting of the Nebraska State Bar Association was held in Omaha on December 28 and 29, with ex-Secretary of the Interior James R. Garfield as the principal speaker. Details of the meeting will be given in this column next month.

CHICAGO LAWYER MINISTER TO CHINA. — William J. Calhoun, a well-known Chicago attorney, was on December 6 appointed minister to China. Mr. Calhoun is sixty-one years old. He is one of the most prominent corporation lawyers in Chicago and is senior member of the firm of Calhoun, Lyford & Sheehan.

JUSTICE FITTS DIES SUDDENLY. — Justice George H. Fitts, of the New York Supreme Court, died suddenly of heart disease on December 17 in a hotel at Kingston, N. Y., where he was presiding at a murder trial. Justice Fitts was fifty-eight years old and was a graduate of Dartmouth and of the Albany Law School. He was elected to the Supreme Court in 1905.

MASSACHUSETTS TO HAVE BAR ASSOCIATION. — With the purpose of organizing a State bar association invitations were sent out early in December to leading lawyers of Massachusetts to meet at the Hotel Somerset in Boston on December 22. Hon. Richard Olney was to preside. The result of this conference will be chronicled in our next issue.

WELL-KNOWN CONNECTICUT LAWYER DEAD. — Arthur F. Eggleston, for many years State's attorney for Hartford county, Conn., and a leading member of the Hartford bar, died in that city on November 30 at the age of sixty-five. He was graduated from Williams College in 1868 and was admitted to the bar in 1872. He became State's attorney in 1888, succeeding Judge William Hamersley.

NOTED INDIANA ATTORNEY DEAD. — Henry Colerick, widely known in Indiana as a criminal lawyer and Democratic politician, died in his home town, Ft. Wayne, Ind., on November 18. While standing in the office of a local hotel he was attacked by heart disease and quickly passed away. Mr. Colerick was sixty-three years old. For seventeen years he held the office of city attorney of Ft. Wayne.

CARPENTER SUCCEEDS JUDGE BETHEA. — Judge George A. Carpenter, chief judge of the Cook county, Ill., Circuit Court, has been nominated by President Taft for the office of United States District Judge for the Northern District of Illinois to succeed the late Judge Solomon H. Bethea. Judge Carpenter is forty-two years old. He was graduated from Harvard in 1888, from the Harvard Law School in 1891, and was admitted to the bar in the latter year.

CANADIAN BENCH CHANGES. — Sir Louis Jette has been appointed chief justice of the Court of King's Bench of Quebec to succeed the late Sir Henri Taschereau. Judge A. Malouin, of the Arthabaska judicial district, has been transferred to Quebec to fill the vacancy caused by Sir Louis Jette's promotion. Hon. L. P. Roy, Provincial Secretary, has been appointed judge of the Supreme Court for the district of Rimouski.

TO REFORM FRENCH CRIMINAL PROCEDURE. — As a consequence of the Steinheil murder trial in Paris a commission has been appointed by the French government to inquire into the problem of the reform of criminal procedure. One change that will almost certainly be adopted is the abolition of the interrogation of the prisoner by the judge, who under the present system really acts as the prosecutor. On November 19 in Paris, for the first time in a French Assize Court, a trial was conducted after the Anglo-Saxon fashion. This was done at the request of Minister of Justice Marthou.

DEATH OF DISTINGUISHED GEORGIAN. — Hon. Fleming G. du Bignon, one of the most distinguished lawyers of the State of Georgia, died at his home in Atlanta on November 19 at the age of fifty-seven. He was admitted to the bar in 1873 and rapidly rose to prominence in his profession. As a politician and legislator he was even better known than as a practitioner, being several times a member of the State Legislature and president of its upper house during the session of 1888–1889. In 1896 he was a candidate for the United States Senate on the gold platform but was defeated by the late Senator Crisp.

CALIFORNIA STATE BAR ASSOCIATION. — At a meeting of representative lawyers from all parts of the State held in San Francisco on November 10 the California State Bar Association was organized and the following officers were elected: President, Judge Curtis H. Lindley, of San Francisco; vice-presidents, M. K. Harris, of Fresno, Lynn Helm, of Los Angeles, and F. W. Street, of Tuolumne county; secretary, E. J. Mott, of San Francisco; treasurer, T. W. Robinson, of Los Angeles. The first annual meeting of the new organization will be held at Los Angeles.

OREGON STATE BAR ASSOCIATION. — The annual meeting of the Oregon State Bar Association was held in Portland on November 16 and 17, with President Wirt E. Minor in the chair. The addresses delivered were as follows: "American Lawyers in China," by W. P. Rice; "The Constitution," by W. P. La Roche; "Criticism by the Press of the Decisions of the Courts," by Charles W. Fulton; "Legal Technicalities," by Sam L. White; "Defective Laws Respecting the Election of the Judiciary," by Frank L. Post, of Spokane, Wash. Other addresses were delivered by Martin L. Pipes and the retiring president. The meeting was closed with the annual banquet, which was held at the Commercial Club.

COURT OF APPEAL FOR BRITISH COLUMBIA. — The new Court of Appeal for British Columbia has been constituted by the appointment of Mr. J. A. Macdonald, ex-Liberal leader in British Columbia, as chief justice; Mr. W. A. Galliher, ex-M. P., and Judges Archer Martin and P. A. Irving, who are promoted from the Supreme Court of the Province. The places of the last two on the Supreme Court bench have been filled by the appointment of Messrs. F. B. Gregory, of Victoria, and Dennis Murphy, of Ashcroft, a former member of the British Columbia government, to the Supreme Court.

A NEW DEPARTURE IN PATERNALISM. — The municipal authorities of Nuremburg, in Bavaria, have recently instituted an experiment which, if it prove successful and contagious, will likely cause the legal profession to sit up and take notice. It

consists in the establishment of a municipal bureau for the purpose of supplying free legal advice to persons of very limited means, regarding police, military, school, and pauper regulations, as well as a host of other matters. If Bavaria is anything like America the authorities will doubtless find considerable difficulties in confining the benefits of the institution strictly to the poor, and the bureau itself will almost certainly develop into a hotbed of graft.

RHODE ISLAND BAR ASSOCIATION. — The annual meeting and dinner of the Rhode Island Bar Association was held at the Churchill House in Providence on December 6. The principal address was delivered by James M. Beck, of New York, whose subject was "Nullification by Indirection." Joseph A. Lawson, of Albany, spoke on "Residuary Legatees." Raymond Robins, of Chicago, a sociological expert, spoke on the subject of "How Criminals Are Made." The following officers were elected for the ensuing term: President, Dexter B. Potter; vice-presidents, Walter F. Angell and Albert A. Baker; secretary, Howard B. Gorham; treasurer, James A. Pierce.

PROMINENT VIRGINIA LAWYER DIES. — Hon. John D. Horsley, formerly a circuit judge and one of the ablest and most widely known members of the Virginia bar, died at his home in Lynchburg on November 20, aged seventy years. During the Civil War Judge Horsley was a student at the Virginia Military Institute and was in the ranks when the cadet corps made its celebrated charge at the battle of Newmarket. In 1873 he was admitted to the bar after being graduated from the University of Virginia law school, and in 1884 he was made a circuit judge. In 1894, after his retirement from the bench, he took up practice in Lynchburg and represented large interests there down to the time of his death.

DEATH OF EX-ATTORNEY-GENERAL OF RHODE ISLAND. — Jerome B. Kimball, former attorney-general of Rhode Island, died in Providence on December 3, after an illness extending over nearly half a century. He was born in Southbridge, Mass., in 1832, but in early life located in Providence, where, shortly after his admission to the bar, he became a law partner of Governor Henry Howard. At the remarkably youthful age of twenty-seven he was elected attorney-general of Rhode Island, but during his second term in that office he suffered an attack of typhoid fever, which practically ended his active career and since 1860 he had been confined to his bed the greater part of the time.

DEATH OF LEONARD A. JONES. — Leonard Augustus Jones, for ten years chief judge of the Massachusetts Land Court, formerly editor-in-chief of the *American Law Review*, and the author of several well-known legal text-books, died at his residence in Boston on December 9. Mr. Jones was born in 1832, was graduated from Harvard College in 1855, from the Harvard law school in 1858, and practiced in Boston from that time until 1874. He then turned his attention to law writing and produced a number of books, the best-known of which is probably his work on "Mortgages." From 1885 to 1904 he was associate editor of the *American Law Review*, and from 1904 to 1907 was its editor-in-chief. In 1898 he was appointed to the bench of the Land Court by Governor Wolcott and held the post until last January, when illness compelled him to retire. From 1891 to 1902 Mr. Jones was commissioner from Massachusetts for the promotion of uniform legislation in the United States.

A COURT has no right to strain the law because it causes hardship. Lord Coleridge, C. J., Body *v.* Halse, (1891) L. R. 1 Q. B. [1892], p. 207.

English Notes.

NEW LORD JUSTICE FOR IRELAND. — Mr. R. R. Cherry, K. C., M. P., attorney-general for Ireland, has been appointed a Lord Justice of Appeal in Ireland, in place of the late Lord Justice Fitzgibbon.

INDIAN LAWYER APPOINTED TO PRIVY COUNCIL. — The Right Hon. Syed Ameer Ali, C. I. E., has been appointed a member of the Judicial Committee of the Privy Council, in the place of the Right Hon. Sir Andrew Richard Scoble, K. C. S. I., resigned. Mr. Ameer Ali, who is the first Indian to achieve this honor, was admitted to the bar at the Inner Temple in 1873. After many years of successful practice in the courts of India he was in 1890 made a judge of the High Court of Bengal, being the first Mohammedan to attain to such dignity.

DEATH OF LORD SELBY. — William Court Gully, Viscount Selby, long a leader of the English bar and speaker of the House of Commons from 1895 to 1905, died at his residence in London on November 6, aged seventy-nine years. He was called to the bar at the Inner Temple in 1860 and joined the Northern Circuit, where he was a contemporary of Lord Herschell and Lord Russell, of Killourn. After obtaining a large practice in Liverpool he was made a Q. C. in 1879 and two years later he was elected a Bencher of his Inn.

LAWYER'S FATAL MISTAKE. — Edwin Webb, a lawyer of Portsmouth, lost his life on December 1 through his propensity for photography. On going to his dark room in the cellar of his house to develop some plates he poured out a glass of beer to drink while at work. Later he poured into the same glass, mistaking it for another, some cyanide of potassium. After working for a while he picked up the glass and drained it. Instantly realizing his fatal error he snatched a scrap of photographic paper and began scribbling a note to his wife telling her what had happened. He was found dead in the cellar with the note unfinished.

SUFFRAGETTES BAGGED THE WRONG VICTIM. — At the Salford County Court recently an action was brought against three suffragettes to recover 10*l.* damages for injuries to a waiter at a political meeting by falling glass. It seems that these suffragettes undertook to further their cause at a Liberal demonstration by throwing iron balls on the glass roof of the building, and incidentally the plaintiff's hand was badly cut, although, be it said, he was in no wise hostile to "votes for women." The ladies paid the amount into court without contesting the claim, thus clearly indicating that the waiter was not the party whose attention they were endeavoring to attract.

VICTORY SNATCHED FROM DEFEAT. — That a refusal to accept defeat is sometimes rewarded in litigation is illustrated by a recent judgment of the Judicial Committee of the Privy Council. The case, which related to pilotage dues, was first decided by Mr. Justice McLeod, of New Brunswick, whose judgment was affirmed by the Supreme Court of New Brunswick, and the decision was also upheld by the Supreme Court of Canada. Now the Judicial Committee, consisting of Lord Macnaghten, Lord Atkinson, Lord Collins, and Lord Gorell, has decided that the Canadian courts were all wrong. The amount in dispute did not exceed $735, and the victorious party in the Canadian courts, who has now to pay all the costs of the litigation, doubtless has but a poor opinion of the Judicial Committee of the Privy Council.

RECOVERY FOR INJURIES IN FOOTBALL GAME. — A somewhat novel application of the Workmen's Compensation Act was recently made by the Court of Appeal in Walker *v.* Crystal Palace Football Club, noted in the *Law Journal* for November 20, at

page 693. The plaintiff, who was a professional football player, brought an action against the club by which he was hired to recover damages under the act for injuries sustained by him in a game. It was contended by the defendant that the plaintiff was not a "workman" within the meaning of the act, since the services rendered by him in playing games of football were rendered, not under the direction of his employers, but according to his own judgment and discretion. The Court of Appeal, however, upheld an award in favor of the plaintiff, holding that he was bound in playing to obey the general instructions of the club, and particularly those of the captain, who was the club's delegate.

VOTE OF LAW LORDS ON FINANCE BILL. — On the question of the constitutionality of the recent action of the House of Lords in rejecting the Budget, it is interesting to note that of the sixteen Law Lords present eight voted with the majority, four on the other side, and four refraining from voting. This would seem to indicate that the weight of legal opinion in the House of Lords is against the view that the course pursued by that body was unconstitutional. Those voting in favor of the Finance Bill were Lord Loreburn, Lord James of Hereford, Lord Shaw, and Lord Coleridge. Those voting to reject the bill were Lord Halsbury, Lord Alverstone, Lord Ashbourne, Lord Macnaghten, Lord Collins, Lord Atkinson, and Lord O'Brien. Those not voting were Lord Gorell, Lord Dunedin, Lord Moncreiff, and Lord Kinnear. But in England the voters constitute the court of final appeal on constitutional questions, and the opinion of the Law Lords will not count for much as against the result of a general election.

BIRTHDAY HONORS FOR LAWYERS. — The only practicing lawyer to figure in the recent distribution of honors to commemorate the King's birthday was Mr. Frederick Low, K. C., who received the honor of knighthood. However, a baronetcy was bestowed on Mr. Justice Johnson of the Irish King's Bench; and Sir Arthur Godley, who received a peerage, is a member of the bar, having been called at Lincoln's Inn in 1875. Moreover, several of the colonial recipients of the honor of knighthood are lawyers. Sir G. H. Reid, K. C., of Australia, joined the bar of New South Wales in 1879; Sir Leslie Probyn, Governor of Sierra Leone, was called to the bar at the Middle Temple in 1884; Sir John Lancelot Stirling, president of the Legislative Council of South Australia, became a member of the Inner Temple in 1872; Mr. Justice Wessels has been a judge of the Supreme Court of the Transvaal since 1902; and Sir Walter Napier, lately attorney-general for the Straits Settlements, was called at Lincoln's Inn in 1881.

SALARIES OF ENGLISH JUDGES. — In the days of Queen Elizabeth the judge was a less costly article than he is in the twentieth century. "The Lord Cheefe Justice of England" in 1598 received for "fee, reward, and robes, 208*l.* 6*s.* 8*d.*; wyne, 2 tunnes at 5*l.* the tunne, 10*l.*; allowance for being Justice of Assize, 20*l.*" "The Lord Cheefe Justice of the Common Pleas" was something poorer, though he had an additional fee of 12*l.* 10*s.* 8*d.* "for keeping the assize in the Augmentation Court." His "wyne" came to 8*l.* only; and his "fee, reward, and robes" to 141*l.* 13*s.* 4*d.* The three judges of these two courts had 128*l.* 6*s.* 8*d.* per annum for "fee, reward, and robes," and 20*l.* as an assize allowance. "The Lord Cheefe Baron of the Exchequer" had in all 132*l.* 17*s.* 8*d.*; and each of his puisne barons 79*l.* 10*s.* 8*d.* And at these humble figures the salaries of the judges might have remained but for the wisdom of Parliament in the thirty-second year of the reign of King George II. Observing that his Majesty's judges were not properly remunerated, and conceiving that the litigants who availed of their services were the proper persons to augment their stipends, the Legislature enacted that there should be additional stamp duties on affidavits, common bail parchments, rules, orders, writs, declarations, depositions, and so forth; and that out of the moneys so arising each puisne judge of the Courts of King's Bench and Common Pleas should have an annual 500*l.*, and each Baron of the Exchequer an annual 1,000*l.* The surplus, which was probably considerable, went into the national exchequer. An extra 400*l.* was given to the common-law judges and the Barons of the Exchequer in 1779; and in 1799 the ordinary judge's income was fixed at 3,000*l.*; in 1809 the 3,000*l.* became 4,000*l.*; and in 1826 it grew to 5,500*l.* — the top-water mark. Shortly after King William IV. ascended the throne the 5,500*l.* was reduced to 5,000*l.* Each court of common law had been given a fifth judge, and economy had therefore to be practiced.

THE STAGE CENSORSHIP. — In a recent issue the *Law Journal* says editorially: "It is a remarkable thing that England, which has produced one of the most splendid dramatic literatures of the world, should at all periods have placed the theatres and actors under legal restraint. A statute of Queen Anne classed all common players of interludes among rogues and vagabonds, and when the Act of George II., which established the censorship, was passed, although this sweeping charge was removed, it was provided that any person acting any play or entertainment on the stage for gain without patent from the King or license from the Lord Chamberlain should be liable to the penalties inflicted on rogues and vagabonds. In the case of Rex *v.* Neville (1830) it was held that this prohibition prevailed throughout the kingdom, and hence we have the fettering power of the censorship. Several select committees have considered the censor, and have reported favorably upon him. But the vagaries of the existing examiner of plays and the growing demand for freedom of expression by living dramatists had roused a strong feeling of resentment against the retention of the office in its present form. It was well-nigh certain then that the select committees of the two Houses of Parliament, which has just reported, would suggest changes in the law and practice; but in the endeavor to satisfy at once the theatrical managers who want security of production, and the authors who want freedom of expression, it is doubtful whether they have pleased either side. What they propose in effect is a double system for controlling the theatres. 'It should be optional to submit a play for license, and legal to perform an unlicensed play whether it has been submitted or not.' When the censor's approval has not been obtained, the director of public prosecutions may interfere on the ground of indecency, and bring the manager before the ordinary courts, or the attorney-general may interfere on six other specified grounds, and bring the manager before a special committee of the Privy Council, consisting partly of lawyers and partly of laymen, who may impose penalties and indorse the license of the offender. In our opinion, the dual control is not a happy compromise, and the standing committee of the Privy Council, though well-conceived, might perform a more useful service as a court of appeal from the censor than as an exceptional *arbiter morum*. The treatment of the censorship is, however, not the most important, though the most prominent, of the committee's recommendations. The agitation about the censorship is, after all, rather a theatrical display. The committee's proposals of equal treatment for theatres and music halls, and of substituting in every case for the licensing authority of the Lord Chamberlain the control of the County Council — these are suggestions of great practical value, and would put an end to some hard anomalies."

WE ought not to encourage vexatious prosecutions, which tend to throw corporations into confusion. **Lord Mansfield**, *Rex* v. *Wardroper*, (1766) 4 Burr. Part IV. 1965.

Obiter Dicta.

INCREDIBLE. — In Columbus *v.* Myers, (Miss.) 47 So. 787, a witness on being asked what his name was replied, "February 23." The court declined to credit his testimony.

AN UNUSUAL COMBINATION. — The following notice was recently issued by a justice of the peace of Seminole, Oklahoma:

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with Dr. Phillips
We Will Now Sling Phyic, Justice
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NONCOMMITTAL. — The messenger of the Superior Court in Boston informed one of the judges that Mr. Blank wished to see him. "Is he a lawyer?" asked the judge. "I won't go as far as that," said the messenger, "but he's a member of the bar."

A MAXIM OF EQUITY. — At a recent bar examination in a Western State the applicants were asked to give the principal maxims of equity. Among those submitted by a colored brother who was seeking admission was this: "Do not go to sleep on your laches."

STEADFAST IN WELLDOING. — That Missouri lawyer who gave up his profession a few months back and took to preaching was still hanging on at last accounts. According to a St. Louis newspaper he squared up his last saloon bill on December 4 and is now industriously preaching to his neighbors.

A NEW KIND OF WIDOW. — In the case of *In re* Walker, 21 Am. Bankr. Rep. 133, Judge Ross refers to "the amended original petition filed by Alexander J. Woodside, E. A. Groezinger, and E. O. Schraubstadter, co-partners, doing business under the firm name and style of A. Finke's Widow."

NEW DUTIES FOR CLERKS OF COURT. — The clerk of the Circuit Court at Goshen, Ind., recently received a postal card which contained the following request:

"Please call and collect garbage at 801 South Main St., and oblige MRS. P. RYAN."

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JUSTICE HARLAN STILL LEARNING LAW. — Associate Justice John Marshall Harlan, of the United States Supreme Court, while riding on a street car in Washington recently, became incensed at the sight of a couple of colored youths placidly keeping their seats while two aged ladies were obliged to stand. He appealed to the conductor to make the negroes give the ladies their seats. "Sorry, boss," said the conductor, "but that's against the law." The eminent jurist breathed hard for a while, but refrained from any attempt at judicial legislation.

A DENTIST WITH A GRIEVANCE. — A referee in bankruptcy in one of the Southern States recently received from a dentist the following self-explanatory letter:

"Yours of a few days received.

"The thanks are on my part to you for the interest you showed my attorney. But, I am sorry that you could not help

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me out in that case. As was stated just after his wife had the work finished and place in they bankrupt — so I appeal unto you for help. Dear Sir is there no way out of such cases — Will not the courts give a dentist a lean (a mechanics lean) on the work done, and give his power to remove from any patient mouth a plate, bridged work, when a patient fails to pay for same.

"Now — this is the way they will do — come in and tell you that they wish you to put in a crown bridge or plate, — pay part of it and ask you to finish it up. When finish that they will have the money. And that they have got the money ready, then as soon as you put it in, they will say I have not the money but will bring it a certain day, and then never pay or come back.

"Dear sir, I pray that you will look through this matter and let me know if there is no redress, or a chance of taking back your work done in the mouth.

"Will you please send me a statement from the U. S. Court giving me a chance of a lean on all mechanical work.

"I hope you will not think me out of place. I am simply asking for protection after I have spent both time and money.

"Thanking you in advance,"

In reply the referee wrote as follows:

"I have your letter of the 27th ult. I fear you cannot enforce a material man's or mechanic's lien *in rem* upon an individual of the *genus homo*. Aside from national and State constitutional prohibitions against such procedure, I fear that the United States Marshal or the State Sheriff would have some difficulty in specifically enforcing the orders of the court. Even if the defendant were complaisant and willing to submit to dental operations performed by the Marshal or the Sheriff, neither the State nor the Federal Court would be willing to stand responsible for the resultant physical effect upon the patient.

"I do not wish, however, to pre-judge your case, and, if you wish to institute proceedings, obtain the advice of competent counsel and go ahead."

Correspondence.

A WOMAN LAWYER'S PROTEST.

To the Editor of LAW NOTES.

SIR: I must protest against your editorial "Women in Law Schools." Because in the East one young woman has sought admission in a law school notoriously open only to men, an editorial writer, also from the East, must forsooth send to the West a denunciation of all women in all law classes and in the practice of the law, calling to his aid certain remarks, as reported, of a certain Judge *Gross-kopf*, who by a public expression of his private opinion has been the subject of considerable ridicule, more or less good-natured.

Meanwhile in many law schools young women are quietly and earnestly pursuing their studies, embarrassing neither their instructors nor their future brothers-in-the-law, graduating and entering upon whatever duties they may find at their hand, discharging them faithfully and conscientiously.

A public guardian here in Chicago embezzled and fled with the funds of his helpless wards. Would you therefore condemn all men acting as lawyers and as public guardians? But a judge of the Probate Court in Chicago and the Governor of the State of Illinois saw at hand a gentle woman, Mary M. Bartelme, who could supervise with motherly care several hundred waifs, some of whom have been thrust upon her late Saturday night, without a roof to shelter them nor suitable clothes to wear, a gentle, womanly woman, who could win the hearts of her charges, but who could guard their little property with the eye of a lynx and the wisdom of a serpent, because she had had the freedom of some law school. And so she has served faithfully and ably, continuously reappointed, since shortly after the World's Fair. Would you "question her fitness for the legal profession"? This is only one example of the army of women lawyers who are making the influence of their legal training felt within their own little circles, smiling at, but feeling none the less keenly, the carping criticism from that orient that would if it could swaddle and enchain all women that they might not help their sisters, nor their sisters' children.

(Miss) MARION H. DRAKE,
CHICAGO. *Attorney-at-law.*

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Law Notes

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Organization of State Bar Associations.

RICHARD OLNEY, former Attorney-General of the United States under Cleveland's administration, and a prominent Massachusetts lawyer, in a recent address presents a strong argument in favor of the organization of State bar associations. While recognizing the great value of local associations, he is of the opinion that their sphere is too limited. In matters of interest to the profession generally, it is only through the co-operation of the entire body of lawyers that the best results can be obtained. Mr. Olney, in speaking on this point, says: "On such subjects as changes in the general laws, state or national; as substantially identical legislation by the several States on various topics; as the selection of judges for the higher courts; as the mutually helpful relations that should subsist between all other bar associations and the American Bar Association; only a bar association which is representative of the entire body of lawyers of a State can speak with the necessary authority or can hope to have the necessary influence."

The main object of such an association should be "to uphold the honor of the profession of the law." The widespread idea that the lawyer of to-day is merely a necessary adjunct to business ventures, whose province is to advise as to how the law may be evaded without a direct violation of it, or to find loopholes to escape its provisions, is erroneous. As the speaker points out, the ethical standards of the profession will compare favorably with those of the modern business man, and the fact that some of the profession are engaged in a practice which meets with the criticism of the people at large is no ground for the indictment of the legal profession, but is due to the materialism of the day. It should be the purpose of a State bar association to aid in bringing about better conditions, and to impress upon the profession and the public generally a high standard of conduct.

Leisurely Revision.

UNITED STATES SENATOR SUTHERLAND, of Utah, has contributed to the *North American Review* an article entitled "The Nation's First Penal Code." Senator Sutherland is a member of the Joint Committee of the House and Senate which is responsible for this Code. He terms it "a comprehensive and coherent revision," and LAW NOTES joins in the satisfaction which he evidently feels over the creditable completion of a very important piece of legislation. We regret that we do not look with cheerfulness at the prospect of a complete revision of all the federal laws with which, according to Senator Sutherland, the committee now intends to proceed. The Penal Code, composed of three hundred and forty-five sections, fills about seventy-seven pages of print. Work was begun on it by a special commission twelve years ago. A simple mathematical calculation will show the prospects of this generation of lawyers for looking upon a general revision of all our federal laws. Do the federal revisionists know that while they were spending twelve years in producing the pamphlet containing the Penal Code, a commission in New York in four years revised and consolidated in a scientific manner *all* the statutes of that State — laws which were even in worse confusion and greater in mass than are the statutes of Congress? For purposes of further comparison it would be interesting to know the cost of the two undertakings. Here is an opening for an inquiring congressman of an economical turn of mind.

Lawyers' Advertisements in the News Columns.

OF imaginary causes of action there is no end, and much fanciful litigation is a weariness of the flesh. Now comes the report of a lawyer of Toronto who brought a suit to enjoin a newspaper from continuing to omit his name from the published report of court trials in which he appears as counsel. The defendant had already been guilty of at least one such offense. The grievance was that the complainant was being denied the benefit of the advertising which the mention of his name would mean. The High Court of Toronto to which the suit was brought refused the injunction, ruling that a newspaper in publishing the reports of trials has the right to make such reports as brief as it pleases, and print just so much thereof as it desires, so long as it does not cast aspersions on anybody in such a way as to bring itself within the law of libel. We can find no fault with this decision and do not see upon what grounds the complainant based his hope for legal redress. We recently printed in another column of this paper a statement of a decision wherein it was held that a reputable express company doing business in a certain community had a right to enjoin the omission of its name from a directory furnished to shippers in the community and claiming to give the names of all reputable companies doing business therein, but there the inference from the omission was that the complainant was not a reputable company, and the injury was substantial and real. The Toronto attorney could find no comfort from this case. Indeed, he seems to have been having his innocent joke far afield of any judicial precedent or legal principle. The name of the lawyer who manages a case deemed of sufficient importance to be reported in the newspaper columns naturally forms a part of the news, and contributes to its human interest, but the attorney's right

to this gratuitous advertisement will have to be safeguarded by the desire of the newspaper to give its readers the news and not by legal redress. We may next expect to hear of a case in which a newspaper seeks to enjoin some lawyer who furnishes news items for the purpose of advertising his name in connection therewith.

The Proposed Commerce Court.

IN his special message of January 7, particularly with reference to the creation of a commerce court and changes in the anti-trust law, President Taft speaks as one who knows. The suggestion of a court to deal especially with questions arising under the interstate commerce laws is entitled to most respectful consideration when emanating from one whose judicial experience has been long and varied. The need for such a court, as outlined by the President, arises, in the first place, from the fact that the inferior federal courts have not been uniform in their rulings with reference to the orders of the Interstate Commerce Commission. In some instances injunctions have been granted, on *ex parte* applications, against the enforcement of such orders; thereby, as the Commission justly complains, overturning "the result of days of patient investigation." Secondly, the delay in getting a decision from the United States Supreme Court when an appeal is taken to that tribunal is as exasperating as it is apparently inevitable. Such a condition of affairs, it can hardly be denied, is not conducive to an efficient administration of the law. It is, as the President says, of supreme importance that "the decision of such questions shall be as speedy as the nature of the circumstances will admit, and that a uniformity of decision be secured so as to bring about an effective, systematic, and scientific enforcement of the commerce law, rather than conflicting decisions and uncertainty of final result." To accomplish this, the President recommends the establishment of a court to be composed of five judges designated from among the federal circuit judges and to be known as the United States Court of Commerce, which court shall be clothed with exclusive original jurisdiction over the following four classes of cases: All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty, or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money; all cases brought to enjoin, set aside, annul, or support any order or requirement of the Interstate Commerce Commission; all such cases as under section 3 of the Act of Feb. 19, 1903, known as the Elkins Act, are authorized to be maintained in a Circuit Court of the United States; and all such mandamus proceedings as under the provisions of section 20 or section 23 of the Interstate Commerce Law are authorized to be maintained in a Circuit Court of the United States. It is difficult to imagine what just objection can be offered to the President's plan. The expense of the court is inconsiderable viewed from any aspect, and the proposal should certainly meet with favor from those who condemn so constantly and so severely the law's uncertainty and delays.

Changes in the Sherman Law.

LIKEWISE, the President's views touching the amendment of the anti-trust law, or Sherman Act, should be accorded unusual weight. Contrary to what we should naturally expect, in view of the criticism to which the statute has been subjected in the past five years, even, it must be admitted, by Mr. Taft himself, the President actually recommends that the law be not changed at all. One of the reasons heretofore urged for amending the law has been the construction placed upon it by the Supreme Court in several cases. It has seemed as if that court were inclined to make the act all-embracing and to read within its prohibitions all combinations in restraint of trade as unreasonable. As the President says, the expression "restraint of trade" comes from the common law, and "at common law there were certain covenants incidental to the carrying out of a main or principal contract which were said to be covenants in partial restraint of trade, and were held to be enforceable because 'reasonably' adapted to the performance of the main or principal contract." President Taft easily recognizes what perhaps no one but the demagogue fails to recognize, that there is neither necessity nor desire for legislation against a mere incidental restraint of trade and competition, but that it is the combination or conspiracy or contract that is inevitably and directly a substantial restraint of competition, at which the statute is aimed. With the keen eye of the trained lawyer and judge, however, the President notes that the attitude of the Supreme Court has of late been gradually changing. He says: "A close examination of the later decisions of the court, however, shows quite clearly in cases presenting the exact question, that such incidental restraints of trade are held not to be within the law and are excluded by the general statement that, to be within the statute, the effect upon the trade of the restraint must be direct and not merely incidental or indirect." The President in consequence concludes as follows:

"The necessity, therefore, for an amendment of the statute so as to exclude these incidental and beneficial covenants in restraint of trade held at common law to be reasonable does not exist. The statute has been on the statute book now for two decades, and the Supreme Court in more than a dozen opinions has construed it in application to various phases of business combinations and in reference to various subjects-matter. It has applied it to the union under one control of two competing interstate railroads, to joint traffic arrangements between several interstate railroads, to private manufacturers engaged in a plain attempt to control prices and suppress competition in a part of the country including a dozen States, and to many other combinations affecting interstate trade. The value of the statute which is rendered more and more certain in its meaning by a series of decisions of the Supreme Court furnishes a strong reason for leaving the act as it is to accomplish its useful purpose, even though if it were being newly enacted useful suggestions as to change of phrase might be made."

Of course there will be many who, honestly or otherwise, will disagree with the President as to the present efficiency of the anti-trust law. But we are disposed to believe that the great majority of the people of the country, whether or not they are willing to admit it, will confidently accept what President Taft has said upon this subject as the word of authority.

Who May Be Naturalized.

THE naturalization laws of the United States restrict the right of naturalization "to aliens being free white persons and to aliens of African nativity and to persons of African descent." First our naturalization laws applied only to the people who had settled the country, that is the European or white race, and so they remained until 1870, when under the pro-negro feeling, inflamed by the war between the States, and its political

consequences, Congress went to the other extreme, and opened the door to the entire African race, thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the "dark continent" while withholding it from the intermediate and much better qualified red and yellow races. Only negroes and white persons are therefore eligible for citizenship, and the trend of the decisions has been to limit the term "white person" rather strictly to persons of the Caucasian race. It has been held that the term excludes a Mongolian, a Japanese, a person half white and half Indian, and a native of the Sandwich Islands belonging to the Hawaiian race. Members of some of the races of Western Asia have, however, been admitted to naturalization. Some close questions and conflict of opinion have arisen as to the status of the races of Asia Minor. Recently Judge Cornish, of Nebraska, denied naturalization to a Syrian born in Asiatic Turkey on the alleged ground that under a ruling at Washington such a person does not come under the classification of "white." The ruling referred to was probably that of the chief of the division of naturalization, which was that Turks, Armenians, and Syrians are barred from naturalization because they are Asiatics. This ruling is contrary to the practice in certain quarters and to the opinion of some of the judges. Lately Judge Lowell of the United States Circuit Court has held in a well-reasoned decision that Armenians are "free white persons and eligible to citizenship." He argues that some of the races of Asia Minor, such as Armenians, are not of the Asiatic or yellow race, but are Caucasians, the outlook of whose civilization is toward Europe, and who, if mental development and ideals are considered a qualification for citizenship, are eligible for naturalization in this country. This decision seems safe and sane. It is apparent, however, that there is much confusion in the administration of the naturalization laws, and this should be set at rest by some general and authoritative ruling.

The Late Dean Ames.

IN the death of Prof. James Barr Ames, dean of the Harvard Law School since 1895, and assistant professor and professor of law in that school since 1873, there has passed away the foremost teacher of law of his time in the estimation of those who knew him best. He was one of the earliest pupils of the late Dean Langdell, under whom he became acquainted with the then new method of teaching law inaugurated by Dean Langdell and known as the inductive or "case" method. Later, by reason of his abilities as a teacher of law, he had more to do with the successful establishment of that method than its originator, and to-day in the leading law schools of this country many of his former pupils, following his successful example, are teaching law to the lawyers of to-morrow from case books rather than text books. Dean Ames, besides being a great teacher, was a profound student of English legal history, but unfortunately he did little legal writing, and therefore the profession at large does not benefit as it should from his having lived. Apart from several books containing collections of cases and articles from time to time in legal periodicals, chiefly the *Harvard Law Review,* he did nothing in legal authorship.

WHEREVER a law is productive of tyranny, I shall ever give my consent to narrow the construction. Willes, J., *Jones* v. *Smart,* (1785) 1 T. R. 49.

The Passing of the Old Guard at Harvard Law School.

THE death of Dean Ames calls attention to the fact that Harvard Law School is fast losing the services of those professors who were associated with the late Dean Langdell during the struggle for the perpetuation of his system of law teaching, and have made that school famous here and abroad. Prof. James Bradley Thayer, the eminent authority on evidence, whose "Preliminary Treatise on Evidence at the Common Law" is a legal classic, was one of the first to go. He was followed by Dean Langdell, and now by Dean Ames, thus leaving Prof. John Chipman Gray as the last of the Old Guard in active service. Furthermore Prof. Jeremiah Smith, who has been associated with the above-named professors for many years, will retire at the close of the present school year. However, the school is fortunate in having splendid talent to fill the breach, notably Prof. Samuel Williston, who has enhanced his reputation by his recent work on Sales, and Prof. Joseph H. Beale, who several years ago was "loaned" to the University of Chicago for the purpose of establishing a law school at that institution of learning. It is safe to say, therefore, that with this nucleus, the school which has done more for legal education than any other will continue to stand in the forefront of American law schools.

Corporation Counsel Watson.

THE editorial office from which LAW NOTES emanates has graduated many judges, deans, and professors in law schools and practitioners now in the front rank in various parts of the country. The making of the books which have had so much to do with the settling and development of our modern law is a training which naturally produces leaders in the legal world. The pride which LAW NOTES feels in this wide appreciation of the merit that has shone so often in its own columns and in the books which have gone out from this little Long Island town, is not lessened by an appointment recently announced by Mayor Gaynor, of New York, viz.: Archibald R. Watson to be Corporation Counsel. The Encyclopædia articles written by Mr. Watson, while a resident member of the Northport staff, number a score or more, and his name will be found signed to some of those most frequently quoted by the courts. His article on "Municipal Corporations" in the American and English Encyclopædia of Law, second edition, has made him especially familiar with the questions he will be called upon to consider. And the field is a vast one. The law department of a city with a population exceeded by few of the States, with a budget only less than that of our national government, with activities in numerous departments on a scale not surpassed by some European kingdoms, is an organization of great complexity. Its head is rewarded with a salary commensurate with the importance of his duties, exceeding that of any other law officer in the national, state, or municipal service. We congratulate Mr. Watson and predict high success for his administration.

A Word to the Helper of Law Students.

WE would respectfully suggest to the *Law Student's Helper,* of Detroit, Mich., that one of the most effective methods of helping law students is by setting them a good example in the matter of ethical conduct. In the January number of that publication we observe no less than fourteen (14) paragraphs which have been lifted

bodily from our "Obiter Dicta" column with no word, mark, or sign to indicate the source from which they were garnered. It is always a pleasure to us to lend a hand in the helping of law students, but we are not sufficiently philanthropic to appreciate in a whole-hearted fashion the delicacy of the *Law Student's Helper* in concealing the identity of the donor of these benefactions. Perhaps we might not have felt so unhappy about this matter if our efforts had appeared in the department headed "Humor," but the sight of them stationed in the editorial column and other pathetic parts of the magazine has caused us very great anguish of spirit. We trust that in selecting the material for its next number the *Law Student's Helper* will not overlook this paragraph, especially as it might serve as the text for a disquisition to law students upon the terms of the new Copyright Act.

A Model Automobile Statute.

A MODEL statute, aimed at drivers of automobiles, is the Rhode Island Act of May 26, 1908, Public Laws 1908, c. 1592, which provides in section 12, among other things, as follows: "Every driver of a motor vehicle, after knowingly causing an accident by collision or otherwise, or knowingly injuring any person, horse, or vehicle, shall forthwith bring his motor vehicle to a full stop, return to the scene of the accident, and give to any proper person, demanding the same, the number of his driver's license, the registration number of the motor vehicle, and the names and residences of each and every male occupant of said motor vehicle." The penalty for violation of the foregoing provision, prescribed in section 18 of the act, is a fine of not more than one hundred dollars or imprisonment not more than thirty days, or both, and the State board of public roads may revoke the license of the offender (section 9). In *State* v. *Smith*, (R. I. 1909) 72 Atl. Rep. 710, a conviction under the act was sustained and the defendant remanded for sentence. A federal statute drawn on the same lines as the Rhode Island statute, and prescribing the duty of masters of vessels in case of collision, is the Act of Sept. 4, 1890, c. 875, 26 Stat. L. 425, 2 Fed. St. Ann. 202. But the punishment for violation of its provisions, as usual in federal penal statutes, is more severe than in the State statute. It is a fine of "one thousand dollars, or imprisonment for a term not exceeding two years."

Joy Riding.

THE daily newspapers tell us of many a tragic "joy ride" in automobiles, and we are sometimes amazed at the temerity of the pleasure seekers. At Los Angeles Paulhan navigated the empyrean in his fragile craft at an altitude of 4,165 feet. If that is too inconvenient a pastime for the joy riders, they can find a novel sensation by taking a hand car without permission — three or four men with four women — "in the early morning," and proceeding with merry speed until, *on a trestle*, they meet a mighty freight train thundering toward them out of a fog and within hailing distance. In *Louisville, etc., R. Co.* v. *Womack*, (C. C. A.) 173 Fed. Rep. 752, five of the occupants of the hand car were killed. But under the drastic provisions of the Tennessee statute the railroad company was held liable for the death of these trespassers, the jury being satisfied that the men on the locomotive were not sufficiently watchful to observe the hand car in time to have avoided collision.

EMPLOYEES' COMPENSATION LAWS.

THE question of compensating workmen for injuries received in their employment is one of the highest importance, not alone to the workman, but to the employer and to society in general. Until the present time this question has been decided by the courts according to the principles of common-law liability, modified in some instances by statutory enactments. This method is very unsatisfactory to all parties concerned. The workman is not satisfied, because it is only for a small minority of the injuries he may receive in his occupation that he can recover damages. Before a workman can recover under the common law there must be negligence on the part of the master, and freedom from contributory negligence on the part of the workman; and further, the injury must not have been the fault of a fellow servant nor the result of an assumed risk, though in regard to the last two elements the law has, of course, been modified to some extent. A contested case may mean a long trial, an appeal, and perhaps a new trial and another appeal, with no certainty of winning in the end. And the employer is dissatisfied because of the constant danger of high and ofttimes excessive verdicts. Whether he wins or loses, he knows that he is bound to suffer financially, for in either case he must stand the expense of defending the suit.

At the conference held in Atlantic City last July, at the invitation of the Minnesota Employees' Compensation Commission, at which there were in attendance representatives of the United States, of several States, of labor, of the employers, and of the employers' liability insurance companies, it was the unanimous opinion of all present that the existing method of dealing with this question in the United States is unfair and unjust to all concerned.

There are certain inevitable risks connected with every industry, that neither human ingenuity nor human foresight can overcome. No matter how careful the employer may be, no matter how careful the employee may be, the industry takes its awful toll year after year. In the United States the burden of these hazards rests on the employee, the one person least able to bear it. All other risks, the risk of fire, of breakage, of deterioration, are charged to the cost of production and eventually placed on the consumer. Why should not the consumer also bear the risk of the workman's injury or death? The United States is the only civilized industrial country in the world that places this burden upon the employee.

The theory of the workmen's compensation acts, or of such legislation by whatever name it may be called, is that where an employee is injured while at work, not as the result of his wilful act, compensation should be paid him by the employer, according to a definite scale, usually based on his wages, and the cost be passed over to the consumer. The question of negligence is entirely eliminated, and the compensation is definitely fixed or made capable of ascertainment. Under the present system there is undoubtedly enough money wasted in adjusting, settling, and litigating claims for injuries, to meet the burden made necessary by a compensation system. If this wasted money could be turned into the channel leading to the injured employee's purse, how much better would be the result.

Twenty-two foreign countries have enacted employees' compensation laws. The industries usually covered are those involving a considerable hazard, such as transporta-

tion, mining, quarrying, manufacturing, and building and engineering work. The countries that have adopted these acts are as follows: Austria, Belgium, British Columbia, Cape of Good Hope, Denmark, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Luxemburg, Netherlands, New Zealand, Norway, Queensland, Russia, South Australia, Spain, Sweden, and Western Australia. In Great Britain, France, and Belgium, the laws are applicable to nearly all employments. In Australia, Belgium, Denmark, Finland, Germany, Italy, Luxemburg, Netherlands, Norway, Russia, Spain, and Sweden, the laws are applicable only, with few exceptions, to workmen engaged in manual labor. They are applicable alike to salaried employees and to workingmen in France, Great Britain, the British colonies, and Hungary, while overseers and technical experts earning more than a certain amount are excluded in Belgium, Denmark, Germany, Great Britain, Italy, Luxemburg, and Russia. Those laws in every case fix the compensation to be paid, and in all countries except Sweden such compensation is based on the wages of the person injured. The whole burden rests upon the employer in all the countries except Austria, Germany, Hungary, and Russia, where the employees bear a part of the expense.

The desirability of such legislation is admitted by every one. The question of possibility, that is, whether such acts will be constitutional, we shall not consider at this time. The question of practicability is perhaps the most difficult of all. The systems in use in the different foreign countries are by no means uniform. Each country has its own scheme, and although all compensation laws in Europe are based on the theory that an indemnity should be paid to an injured workman, yet the details are greatly dissimilar. Somewhere between the compulsory insurance of Germany and the compensation acts of England, there ought to be found a satisfactory compensation law for this country. It is not at all probable that a compulsory insurance scheme could withstand constitutional tests, even if such a plan should be deemed practicable. Any act that may be passed must preserve the common-law right of action for injuries received, although we believe that if the employee is given an option of having something definite and certain in place of the common-law right, he will not be long in taking advantage of the former, so that the retention of the common-law right of action will not amount to anything one way or the other.

A compensation act should provide, among other things, that the employer assume the risk of the industry on a certain definite basis; that all employees be permitted to avail themselves of the act provided they waive their common-law rights on entering the employment; that the employer be allowed either to carry the risk through a private insurance company or in a department of State to be created for that purpose, or to carry it personally (but in the latter case some provision should be made to insure against the insolvency of the employer); that the State department be conducted as a State charge; that the benefits be paid periodically and not in a lump sum; that benefits be paid through fraternal orders or trade unions, to the end that double compensation be not received and that malingering be prevented; and provision should be made for keeping the employer up to the proper standard of care. The reason for compelling the employee to elect upon which method of compensation he will stand is that the employer ought to know, at the time an employee enters his service, whether in case of injury the latter will hold him to his common-law liability, or will take the benefit of the compensation act. It is unfair to the employer to allow the employee to play fast and loose until an accident happens and then take the benefit of one or the other remedy according as the facts of the case warrant. Inasmuch as the State at large wastes a great deal of money each year in master and servant litigation, it would seem just and fair that a portion of this money should be used in conducting a public department to handle the insurance. The creation of such a department would insure stability and confidence, as well as fairer and more satisfactory settlements.

The Atlantic City conference was the first of its kind in this country. Its purpose was rather to allow those interested to meet and exchange ideas and ideals than to settle on any definite plan. The permanent organization resulting therefrom will provide that the conferences shall be solely for the purpose of consultation and discussion, and that at no time shall any fixed plan or policy be advocated.

A. I. ROSBROOK.

AMERICAN CASE LAW:

A CONSIDERATION OF CERTAIN FACTORS BEARING ON THE DEVELOPMENT OF AMERICAN JURISPRUDENCE.*

UPON the establishment of independent government among the different American commonwealths at the close of the Revolution and upon the later establishment, by these commonwealths, of the government of the United States, many things co-operated to bring about in America an era of unprecedented activity and development in law. The organization of the newly formed States upon the representative democratic basis, the calling into play of the forces concerned with the new establishment, the determination and settlement of the relations of the United States government to that of the States, and the determination of the proper relations of the several members of the Union to each other — all required the application of highly trained powers and acted as an extraordinary stimulus to the professional legal mind. Furthermore, the preceding epoch of war with its antecedent excitement and turmoil, together with the confusion and political uncertainty of the years immediately following the termination of hostilities, had generated a conspicuous alertness and openness of mind about political and legal matters and thus prepared the way for the important things that were to follow. There was also something in the preceding spiritual and intellectual condition of colonial society that needs to be taken into account when we consider the causes of the approaching advancement in the field of law. The activities of the colonial period of our history had not been of a kind to draw out the highest intellectual capacities of the people. The hard struggle to subdue nature and bring her resources to minister to the comfort of man had not indeed been without its good moral effect in shaping the character and moulding the powers of the individual man, but as yet these powers were for the most part latent; and in the light of subsequent events it is easy to see that the most highly endowed minds among the American people had not yet found the particular sphere necessary for the best development of the faculties that were struggling for expression. The science of theology had, of course, from the founding of the colonies furnished a

*An address delivered by Thomas A. Street, Professor of Equity in the School of Law of the University of Missouri, before the Kansas City Bar Association, on December 4, 1909.

field where a few able intellects found some scope for exercise, but this branch of learning had at the time of the Revolution lost much of its former potency and could no longer enlist the full sympathies of or stimulate in any great degree the most capable men.

It was thus in the midst of a peculiarly friendly combination of political, social, and spiritual conditions that our lawyers and judges began the work of moulding the legal institutions of our country. The mind of the aspiring thinker had at last found a really congenial field, and in fact the power and spirit of the new world was presently in a great measure concentrated on the legal problems thus created. In this channel, too, the intellectual activities of our people were destined chiefly to run for several decades.

And as the beginning was fair, so it must be said that subsequent conditions have on the whole been highly favorable to a precocious — perhaps too precocious — legal development. The geographical growth of the country and the consequent extension of our people over large stretches of virgin territory have united with internal social and economic development to keep our lawyers and judges busy in adjusting the law to the requirements of ever-changing conditions. During the same period the heavy hand of war has done its part in the creation of new problems and in generating new ideas. The unprecedented industrial development characteristic of our own day has also contributed its share in increasing the problems that have required, and are yet requiring, solution. In view of all these various conditions it cannot be surprising that in the department of law the history of the last hundred years should be marked in this country by amazing progress. Nor, on the other hand, can it be at all surprising that the most conspicuous defects of the body of law that has resulted are such as can be traced, more or less directly, to the forcing process to which the law has been thus subjected.

The task that lay before the bench and bar in the several States at the time of the separation from the mother country was to establish the foundations of a system of law adapted to the needs of our people and in harmony with the changed political conditions. This meant that they were to adopt and apply, so far as practicable, the system of remedies formerly administered in the English courts. The work thus proposed to them was in many respects of an inspiring character, and to the accomplishment of their task courts and lawyers applied themselves with extraordinary vigor, enthusiasm, and success. In laying down the doctrine that English legal rules should be allowed to have effect in these commonwealths only in so far as such rules appeared to be reasonable in themselves and not inconsistent with the spirit of our institutions or our own legislation, our judges would seem to have freed themselves sufficiently from the trammels of precedent; and a person of sanguine temperament might have been justified in expecting that no rules except sensible ones would ever be allowed to creep into the system now to be developed for the people of this country. The situation was indeed a promising one: a new country, new political institutions, an intelligent constituency, and a body of judges inspired by a deep sense of duty; above all, an old and seasoned system of legal rules, to wit, the English common law, from which our courts were free to choose for their own guidance such rules and such only as appeared reasonable in themselves and suited to our conditions. But alas! such is the perversity of fate, and such the limitations of the human faculties, that it is only a short while until the ineradicable difficulties attendant upon the administration of justice begin to assert themselves, and the same or similar shortcomings become manifest that have marked the enforcement of law from the beginning of history. But American law has in the meantime had its great opportunity, and if actual achievement happens to fall short of hope, it must be admitted that our courts and the judges of the courts have bravely striven; and failure, so far as failure must be confessed, is not without honor. Let us then in the brief limits of this paper endeavor to discover how our courts have acquitted themselves in the effort to build up in this country a system of law adapted to our peculiar needs. But obviously the subject thus broadly stated would carry us over too wide a range, and what is now to be said will therefore be limited to a general criticism of the work of the judges as manifested in what is known as case law, by which we mean the published decisions of the courts. What is to be said generally of this vast pile of juridical material? What factors have been most potent in its development? Is the work well done or badly done? and what are its most conspicuous defects?

One who casts his eye over the extensive field of American case law with a view to forming a judgment on the quality of the material of which it is composed should at the outset endeavor to remove from his mind any prepossession in favor of the case law of any particular jurisdiction. And perhaps the best way to assist the reader to the right point of view here is to remind him that no particular State or section of this country has, or ever has had, any monopoly of judicial ability. Nature has shown no special favoritism at this point, and the roll of our great lawyers and judges knows no East or West, or North or South. Of course this does not mean that the product of the labors of all the various courts in our numerous jurisdictions is on the same level of merit; for such is obviously not true. But it means that one who looks into the texture of our case law should be prepared to find and recognize the handiwork of the able man in the decisions of any and every State and section. If Massachusetts claims its Shaw, New York can boast its Kent, Pennsylvania its Gibson, Indiana its Blackford, Tennessee its Cooper, Alabama its Stone, and so on through the complete roll of the commonwealths; while the federal bench exhibits a number of conspicuous names drawn from every part of the country.

While legal genius has thus shown that it knows no geography, there are nevertheless certain territorial divisions that must be taken into account as having a special significance in the development of American law. In this connection we shall take note of the following divisions of that part of the country comprised in the original States, namely: (1) The New England States, (2) the Middle Atlantic States, comprising chiefly New York and New Jersey, (3) the Southern States, and (4) Pennsylvania.

Legal development in the New England States is, from the first, characterized by very radical departures from common-law doctrines. Owing, no doubt, to the long continued political agitation which preceded the Revolution in Massachusetts, and owing to the fact that Boston was a storm centre during the whole period, public sentiment throughout New England acquired a decided bias against all legal rules and doctrines having an English flavor. This manifested itself in a marked hostility to the institution of the Court of Chancery and the equitable doctrines enforced by it; and in the department of law as distinguished from equity, it had the effect of giving the judges a greater feeling of freedom in regard to the rejection of English common-law rules than was manifested in certain other parts of the country. Moreover it is to be observed that the same spirit of hostility to the importation of English legal ideas stimulated legislative activity, thereby introducing numerous statutory innovations upon common-law rules. In the rivalry of innovation Connecticut apparently had the lead over her sister States, for early in the nineteenth century we find it asserted by Zephaniah Swift, the Connecticut author, and compiler of several well-known legal works, that no other State had gone nearly so far in freeing itself from the trammels of the

common law as Connecticut had gone. This early tendency to introduce innovations upon common-law doctrines which we have noted as characteristic of the New England States seems to have been pretty well recognized in other parts of the country, for Mr. Jefferson is recorded as having said on one occasion that there was not one lawyer in New England, or ever could be, who was really versed in the English common law, and that therefore there were no good lawyers there. It should be noted that the statutes of Massachusetts and Maine made no provision for any court exercising full chancery powers, and consequently the development of equity in these jurisdictions was highly imperfect and unsatisfactory.

In the Middle Atlantic States, of which New York and New Jersey were the most important and influential, the radical tendency manifested farther east was not so pronounced, or at least it did not make so deep a mark. In these States legal growth was along more conservative lines, and we note a much greater fidelity in the application of English common-law rules. Furthermore, we find here, at a reasonably early day, the Court of Chancery existing as a well recognized and firmly established institution. In fact in their legal history these communities have shown the same cosmopolitan disposition that has always characterized their people in every line of effort. Certainly the feeling of hostility to England and to English ideas of law was by no means so persistent here as in New England.

Still more conservative, perhaps, in their legal development were the Southern States. In these the spirit of innovation was not nearly so strong as in New England, and we do not find much evidence of the existence of a spirit of hostility to English common-law rules as such. Neither was there any pronounced antagonism to the Court of Chancery. On the contrary, the Chancery Court was cherished in the South from the beginning; and in fact the even and intelligent development of the doctrines of equity may be said to be a characteristic excellence of the jurisprudence of the South during its entire history. Any one conversant with the law and practice of the Southern States will note a certain predilection in its lawyers for the chancery practice and for the doctrines developed in that court. The avidity with which the decisions made by Kent while chancellor of New York were appropriated and applied by the courts of the Southern States during the first half of the last century is a rather conspicuous phenomenon in the legal history of this section; and it affords a striking tribute to the value of the work of that distinguished jurist in jurisdictions beyond the limits of his own State. It may be safely said that the equity jurisprudence of Tennessee — to take one example — has been shaped and determined as much by the work of Chancellor Kent as by the labors of almost any one of Tennessee's own jurists (with the possible exception of the work of Chancellor Cooper). That the courts in the South dealt so sympathetically with equity is doubtless explainable partly by the fact that the social and industrial institutions of the South were of a nature to require the intervention of the Court of Chancery more frequently than elsewhere.

The history of legal development in the State of Pennsylvania forms an altogether unique chapter. Here we find a very exaggerated antagonism to the English remedial system, manifesting itself in a persistent refusal on the part of the legislature to sanction the establishment of any court exercising chancery powers. If Massachusetts would only permit its courts to exercise a very limited equity jurisdiction, Pennsylvania would have none of it at all, that is, so far as the external jurisdiction of her courts was concerned. The opposition to the Court of Chancery in Pennsylvania and in the Eastern States generally was based on the fact that equity powers are derived from the residuary judicial authority of the English sovereign, and in the pre-revolutionary times such powers were exercised, so far as they were exercised at all, by the colonial governor and his council, as representing the king. The hostility to the establishment of chancery was therefore at first not so much a hostility to equity in itself as it was a hostility to the mode in which equity powers were brought into play. But after independence was obtained the old antagonism persisted. In Pennsylvania the difficulty seems to have been for a long while aggravated by the existence of a deep-rooted prejudice against the legal profession — a circumstance fatal to any healthy collaboration between the legislators and the members of this learned body. The inhabitants of Pennsylvania were evidently of a markedly different type from those found in the other colonies.

The consequences of the total absence of any court exercising equity powers in Pennsylvania are well known. One result was that extraordinary perversion of legal remedies which consists in the administration of equity through the common-law forms of action. The Pennsylvania judges were undoubtedly justified in endeavoring to extend the legal remedies so as thereby to give effect to some of the most rudimentary equities, for by so doing they undoubtedly prevented many grievous outrages on human justice. The history of this experiment is exceedingly interesting to the student of comparative law, but it is certainly well that the experiment should have been made in only one jurisdiction. Manifestly any attempt to give effect to equitable doctrines through the forms of law could be only a partial success; and from the point of view of a sound and healthy growth of the law this incident in the development of Pennsylvania law must be considered unfortunate in the extreme.

Having referred to the four divisions of the original States which are most significant in the history of the legal development of this country, we refrain from pressing the matter of geographical distinctions further. We pass over the States of Louisiana and Texas as deriving their legal systems largely from foreign sources; while States carved out of the Northwest Territory and those like Missouri (which, though forming a part of the Louisiana Purchase, yet derive their law chiefly from common-law sources) may be dismissed in this connection with the observation that the history of their legal development offers no salient features on which it is desirable to dwell. It may, however, be proper to suggest here that legal development in these jurisdictions is characterized by a proneness to innovation, and legal learning here shows a less vital connection with English common-law doctrines than appears in the case law of the older States. It would, perhaps, not be difficult to show why this should be so, but we pass on.

The four principal territorial divisions indicated above are chiefly significant in their bearing on the development of equity in the case law of the American States, for it is obvious that the respective degrees in which the courts of the different jurisdictions have accepted and applied equitable rules must have been a very potent factor in shaping the system of law finally worked out in those jurisdictions. In those States where equity and law have developed *pari passu* we may expect to find most conformity with the accepted doctrines of modern English law, which for purposes of comparison and for the purposes of this paper must be taken as an example of normal legal development. On the other hand, where equity has not been fully administered we may expect to find the greatest and most serious departures. It must be conceded, for instance, that the right development of substantive law was much hampered for about one hundred years in New England (more especially in Massachusetts and Maine) by the imperfect and irregular growth of equitable doctrines; and the questionable value of some of the cases from such jurisdictions, on points involving equitable doctrines, is very well understood by the profession at large. Sometimes, too, these equity causes decided in courts exercising limited equity powers, as in Massachusetts, have been accepted as

authority in other jurisdictions with far too little scrutiny; and thus American law generally has been influenced along incorrect lines.

If it were not for the weakness of its equity jurisprudence, we do not believe the title of Massachusetts could be questioned on the point of having the best rounded system of judge-made law that is to be found in this country. But the existence of this blemish makes it possible for two or three other States to claim the distinction with about equal plausibility.

Fortunate, indeed, must be considered those States where law and equity have been equally cherished and each developed with due regard to the other. Who can overestimate the value of the old Court of Chancery of New York not only to that State but to the whole country? Is not the Chancery Court of New Jersey an institution in which all American lawyers may feel a just pride? Long may it survive, along with the chancery courts of Delaware, Tennessee, Alabama, and Mississippi, living exemplars of the system under which justice was so long administered in England!

The existence or nonexistence in any State of a shapely and intelligible body of statutory law cannot but be a factor that will in the end prove a potent one in its effect for good or ill on the judiciary laws of that State. This has not always been sufficiently understood and appreciated by the lawmaking authorities, nor for that matter by the members of the legal profession themselves. It is plain that if the statutory law of a State is in good shape the case law of that State is likely to develop harmoniously and upon intelligent lines; while if the statutes are unshapely, ill-conceived, and unharmonious, the decisions dealing with those statutes are very apt to be in a great measure unintelligible and inconsistent. Under such conditions difficulties multiply and one illogical decision breeds another, until the case law of the State becomes very much larger in amount and much more difficult of comprehension by the lawyer than it ought to be. The best illustration that occurs to the writer of the good consequences following from the existence of a healthy and intelligent body of statutory law is found in the law of the State of Alabama. Fortunately for this State its organic law has been in good form from the beginning, and in 1852 there was put into effect in this State a code compiled by experienced and learned men who had been given authority to reduce the statutes to the form of a code. Their labor embodied a genuine piece of codification, and it was not merely a compilation such as often passes for a code. This codification of the statutory law of Alabama is not to be confused with the adoption at about the same time in many other States of what is known as the reformed procedure. States adopting this new procedure (and Alabama was *not* one of them) are commonly known as "Code States," but this term refers only to the new mode of procedure and has no reference to the general reduction of the whole statutory system to the form of a code, such as was enacted in Alabama. The characteristics of the Alabama Code of 1852 are consistency and intelligibility, combined with terseness of expression and conservatism in its provisions. At many points it merely defined common-law doctrines, and when departures were made the language used was aptly chosen. Since its original enactment the Alabama Code has been revised by a Code Commission acting under the authority of the legislature, at regular intervals of ten years (except for one lapse during the Civil War), and by this means the written law of this State has been kept in very good shape. As a consequence the Supreme Court of that State has had to give comparatively little attention to the ungrateful and difficult task of interpreting and reconciling inconsistencies of legislation. In 1858 the State of Tennessee followed Alabama in the adoption of a similar code, and a few years later Georgia did likewise. Unfortunately for Tennessee there has been no subsequent revision and reduction of later statutes by the process of codification; and as in so many other States her lawyers have to rely upon mere compilations of statutes, sanctioned though they be by legislative authority. No one familiar with the law of these States can doubt that the codes have been of inestimable value to the profession and to the courts, and of course also, by necessary consequence, to the people.

On the other hand, illustrations are not wanting of States where the lack of an intelligent and consistent code has been plainly followed by most serious and injurious consequences. Of this Missouri furnishes a sinister example. In the place of a code there is in this State a prodigious and heterogenous pile of undigested and in great part inconsistent laws. The labor expended by the courts of this State in trying to force light through this mass has been simply appalling. It is undoubtedly due largely to this fact of the bad shape of the State laws that there are more volumes of Missouri Supreme Court Reports than there are volumes of reports of the Court of Appeals of New York. It is unfair to the courts to impose such unnecessary labor upon them, when the difficulties raised by undigested statutes could be so largely removed by intelligent codification. This is altogether apart, of course, from the further injurious consequences of such a state of affairs upon the administration of justice.

The extensive adoption of the reformed procedure in America about forty years or more ago has had a very deep influence on the development of American case law. It has been charged as one of the results of this innovation that it led to the obscuring of doctrines of fundamental importance and to confusion generally. Professor Pomeroy, in the preface to his Treatise on Equity Jurisprudence and in his work on Code Remedies, asserted many years ago that the courts working under the new procedure were disregarding equitable doctrines and were in fact administering hard legal rules in cases where the principles of equity should be permitted to control. The present writer has not discovered much evidence to support this charge, and at any rate the misgivings of the learned author referred to have proven ill-founded. Undoubtedly the publication of his great work on equity was calculated to correct any such tendency as he had noted. There is no reason to doubt that as sound a justice can be administered under the new procedure as under the old system. In lately reading a little book on equity, comprising certain lectures on that subject delivered by the lamented Professor Maitland in Cambridge University, we came across these words, and they caused us to stop abruptly and consider their import. The learned scholar was speaking of the effect of the Judicature Acts in England, and after saying that the distinction between law and equity is largely a mere accident of legal development, he observes: "The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice." This statement may well be true, but it looks so far into the future that we of the present day and time may be excused if we persist in conceiving law and equity as comprising material of entirely different sorts, and as being as incapable of an easy and ready commingling as oil and water.

But while the new procedure may be all right from the point of view of the administration of substantive law, it is certainly justly chargeable with evil results upon the form of our law. It undoubtedly leads to lengthy and discursive pleadings and to verbose and long drawn out opinions. This trouble has in our day become a real abuse, and some remedy should be found for it. If one will take down a volume of common-law reports, such as one of Blackford's Indiana volumes, he will be struck

by the brevity of the statements of fact and the terseness of the discussions of points of law. It is no unusual thing to find all the material facts set forth in a single sentence. Judge Gibson, of Pennsylvania, was especially gifted in his capacity to condense facts and to state in a few words all the reasons of the decision. The modern judges would do well to study the same art. It was a peculiarity of the common-law system of pleading that it led to a clear statement of the determining issue of the case; while the modern way of setting out the supposed relevant facts *in extenso*, leaving the boiling down process to the court, is highly conducive to the spinning out of opinions to inordinate length. The code system is certainly not favorable to terseness of expression.

Yet undoubtedly other causes have contributed to bring about the present unsatisfactory condition of affairs, and the mere mode of pleading is not to be unduly made a scapegoat. Our judges have acquired vicious habits about the writing of opinions and the form of their discussions, which may easily be thrown off. The matter may, perhaps, be stated as follows: Opinions as now generally written embody a minute statement of all the *mental processes* by which the court, or the judge writing the opinion, has reached the conclusion in the case under consideration. On the contrary, we submit, the opinion should state the *conclusion* reached by the court on the main points involved, together with a brief indication of the principle involved. Judging from their present habits we can say that the courts too often show an unnecessary deference to the lawyer on the losing side. It seems to be considered necessary that every argument, however trivial, should be fully met and refuted. Possibly the explanation of this is to be found in the desire of the court to escape the necessity of considering petitions for a rehearing. But we submit that a wholesome disregard of such petitions, when raising questions already involved and presented, would be quite efficacious and would be a better practice than is indicated in the habit just referred to, of putting every imaginable argument *pro* and *con* in the judicial opinion. We may add that we entertain no doubt but that our judges would be more concise in their opinions if they had more time to consider and digest the cases they are called on to decide. Nothing is more incompatible with terseness and precision than haste and the pressure of much work.

But, to revert from this little digression on the evil incident to the unnecessary length of judicial opinions, and to take up our main theme once more, we propose at this juncture to trace a comparison between the history of legal development in two American States now to be mentioned. Comparisons are said to be odious, and the drawing of comparisons is certainly an ungracious task at best; but we shall proceed nevertheless in this particular instance, because this comparison will furnish an excellent illustration of the effect of two factors on the development of American law at large which we have already referred to.

To begin with, we have in mind the States of Indiana and Alabama. These two States were admitted into the Union in the same decade, the first in 1816, and the second in 1819. Each was fairly typical of two quite different sections of the country; and both were created out of territory that had been uninhabited at the time of the formation of the United States government. They were settled by parallel streams of migration, and it cannot be said that either had any noticeable advantage in respect to the quality of its inhabitants. Furthermore, so far as concerns the laying of the foundations of their legal institutions, both communities were practically on a par. Into Indiana there came at about the time the territory was to be organized into a State, a number of aspiring young lawyers who had been educated in the East and who were endowed with fine natural faculties. Among these Isaac Blackford stands out conspicuously, having been schooled at Princeton, and having come to Indiana in his early manhood. About the same time there came to Alabama other young lawyers who had been educated in the East and who now came to cast in their lot with the people of the new State.

At the beginning of her legal development it may be said that Indiana got the best start; for very soon after that State obtained admission to the Union, Blackford was made a judge of her court of last resort and he also became reporter of the decisions of that court. He was an excellent and painstaking judge, and certainly he had no equal as a reporter. Into the hands of the court of which he was a member was committed the delicate task of establishing the law of that State on a common-law basis. How well the work was done is known to all who are acquainted with the judicial history of Indiana. The evidence of the character of this work is found in Blackford's Indiana Reports, a series of reports of unsurpassed excellence. Hardly any other reports as well edited as these have been published anywhere. In their day they were well reputed abroad and were cited with respect in Westminster Hall.

The work done in the early period by the lawyers and judges in Alabama must also be pronounced good, though it cannot be said that any name stands out as conspicuously in the early judicial history of Alabama as does that of the Indiana judge whom we have mentioned.

Now passing over a generation or two and coming down to a period near the present time, we discover that this honorable rivalry of distinction is a thing of the past. The case law of the two States cannot now be mentioned among well-informed lawyers in the same breath, except perhaps for the purpose of pointing out the difference. The case law of Alabama has steadily developed along the same excellent lines, never (except for a very short period during Reconstruction) falling below the standard set by the judges of this State in the first period of her judicial history. The case law of Indiana has, on the contrary, fallen upon evil days. It may almost be said that the case law of this State has suffered something like a complete collapse. This statement will hardly be gainsaid by those whose investigations have led them along lines of research which require the constant use of authorities drawn from every source.

The question naturally arises, why should this be so? Or if the contrast is not quite so pronounced as we have expressed it, why should there be sufficient color to cause so many legal scholars to think that it is so? One explanation that readily occurs is that, in Indiana, they have for a long time had no restrictions upon the right to practice law, and consequently the quality of the material that turns itself to the practice of law must be much lower there than in other States where some learning is required before a person can engage in the business of legal practitioner. This fact undoubtedly goes some way towards explaining the trouble with Indiana law, for of course where many lawyers are ignorant the courts of last resort are unable to give good shape to the body of law embodied in their decisions, even if the court itself is made up of fine judges. But the explanation in question is not entirely adequate, especially when a comparison is instituted between Alabama and Indiana. The standard of admission to the bar has never been high in Alabama, and legal education in that State certainly has not always been of the best.

Looking further, then, for an adequate answer, the writer is inclined to think that the chief factors that have brought about the present difference between the quality of the case law of the two States are these: First, the legal profession in Alabama has had the benefit of an unusually good body of organic and statutory law. This circumstance has already been sufficiently remarked upon in this paper. Secondly, Alabama has never adopted the reformed procedure; and consequently

there has been a legal tradition in this State sufficiently strong to keep the judges and lawyers right in the main. The adoption of the reformed procedure in Indiana must be considered untimely and unfortunate, for it severed legal tradition and cut the profession off too much from the past and wiser age. There was consequently a breakdown in the passage from the old to the new. In other words, we should say that while the reformed procedure may be all right in theory, the practical and successful adoption of it requires the existence of a strong bar and an able bench. The comparison we have thus made illustrates, we believe, two points, namely, that it is good to have a well-drawn code, and that it is dangerous to commit to an immature bar the handling of a mode of procedure entirely different from that to which they have been accustomed. If we remember aright, it was shown a few years ago by one of our leading law publishers that, upon an actual count, the Supreme Court of Indiana had determined a much larger percentage of points of mere practice than the court of any other State, within the period chosen for the purpose of that examination. We wish to add in passing, that our criticism of the case law of Indiana above made has reference more to the work done by the Supreme Court of that State prior to the last ten years; and it is to be understood that the present writer has not sufficient information to justify the expression of any opinion about what is being done in that State at the present time.

The discussion thus far has been chiefly concerned with the case law built up by the decisions of the State courts. If we turn to the decisions of the federal Circuit and District Courts, we find that while these courts have been subject, to a certain extent, to the same influences that have determined the development of the case law of the various States wherein such courts sit, yet the jurisprudence of the federal courts presents a few features peculiar to itself. The peculiar organization of the federal courts and the life tenure of the judges who sit in such courts have undoubtedly tended constantly to the establishment of uniformity; and we find the system of law developed by them always tending to free itself from local peculiarities. It must be remembered also that equity and law have always been separately administered in the federal courts, and that their equity system is uniform throughout all the States. This has led to a splendid development of the jurisprudence of equity in the federal courts, and has given us one of the strongest unifying forces that have operated anywhere in the field of American law. As to the merit of the case law developed in the Circuit and District Courts during the last century, it must be said that this material has by no means been of uniform excellence. A generation ago it was no uncommon thing to hear the lawyers and judges who practiced in State courts refer in disparaging terms to federal decisions; and undoubtedly there was something to justify the poor opinion entertained as to its merit. It will be apparent, however, that the level of merit in the case law of the federal courts has been steadily rising; and it must be conceded that these courts have now built up a distinctive and quite harmonious jurisprudence of their own. It is noteworthy that the cases most commonly cited in federal decisions are taken from the prior decisions of these courts. This tends to certainty and consistency. Furthermore, we have observed that in at least one particular the federal judges have set an example which other courts would do well to follow. This is in the matter of the pertinence of the cases cited by the court in the opinion. It used to be common for judges in many jurisdictions to shovel into their opinions long lists of cases copied from inaccurate and unreliable sources, without making any independent examination of these cases for the purpose of ascertaining whether they were really in point. Our observation is to the effect that the opinions written by federal judges have been and are now freer from the traces of this vicious habit than are the decisions of the State courts. It is a pretty safe guess that the cases cited in an opinion from a federal court will be found to be in point and can be reasonably relied on as determining the question for which they are referred to.

The establishment of the Circuit Courts of Appeals in the various circuits under the Act of 1891 is a circumstance that has tended strongly to raise the level of the merit of decisions from federal courts at large.

Notwithstanding the exalted position of the Supreme Court of the United States and notwithstanding the great ability of the judges who administer justice in it, as well as of the lawyers who are drawn into that forum, we have often had occasion to think that the case law of this court does not compare favorably either in respect to its form or substance with the case law developed in some of the State courts. One of the worst vices that appear to infect the body of law built up by the Supreme Court is a lack of candor on the part of the court in dealing with its own material. It has been observed as a characteristic trick of these judges to attempt to discriminate cases that are readily and fundamentally opposed, and thus in effect to appear to harmonize while they are in fact destroying, or effectually undermining, the cases that are brought under scrutiny. The result has been that in the end nobody knows, not even the court itself, what the law really is on subjects which the court has had occasion to deal with often. It would sometimes appear that the more decisions they make on a particular topic, the greater is the difficulty of discovering what the law really is. Of course this is an overstatement, but the lawyer who has dealt extensively with these authorities will realize in a general way the truth of the charge. Just what the explanation of the matter may be it would, perhaps, be difficult to say. Possibly the fact that the Supreme Court often has occasion to pass on political questions may have something to do with it. Possibly also the circumstance that the judges of this court are chosen from very remote parts of the country and consequently must be taken to reflect in their mental and social make-up many different environments may go some way to explain the diffidence of the judges in dealing with their own case law. Whatever the explanation may be, it is certainly to be hoped that a change for the better will sometime be manifest.

We have already referred to the lamentable prolixity and heaviness of our case law in general. This trouble is not local and is not confined to any particular court or courts. Judicial opinions in this country are loaded with far too many details and are for the greater part too much lacking in the qualities of force and vigor. The judge who writes the opinion too often supplies us, or leaves behind, not only the finished product but all the waste material left over from his mental processes. It sometimes seems as if the judges feel under a sort of compulsion to decide every thing in the world. The courts of our newly admitted States appear to set to work immediately with a view to the establishment of a complete system of judge-made law in the shortest possible time. On the contrary discretion ought to teach them that the least said is often the easiest mended. And experience will show that the system of law which has been longest in coming to its bloom is the best.

Our case law in this country does not compare very favorably, as regards its external form, with the case law of England. Opinions delivered in English courts may be relied on generally to be sprightly and intelligible, and they will also be frequently found to exemplify the inestimable virtue of terseness. There are undoubtedly many reasons why the English courts have the advantage over our own judges in the matter of the general make-up of their decisions. In the first place the English judges do not appear to be as hard worked as the average American

judge. Also the English judge usually brings to the bench a far greater practical experience than the average American judge can boast of. English case law also gets some advantage from the fact that the judges in England deliver their opinions orally. One result of this is that the opinions are usually confined to the salient features of the case, and the judges there acquire a faculty, quite highly specialized and really wonderful in its skill, of stating strongly and forcibly the exact reasoning underlying the decision. A judge who delivers his opinion orally naturally forgets some immaterial points that he would have been certain to bring out if he had undertaken to express his thoughts in writing; and it can seldom be said that an oral opinion loses much in quality by such oversights as are incident to oral delivery.

English case law has also been fortunate in the fact that it has been developed by the labors of a body of professional men who have been able to collaborate with one another much more extensively than American judges have been able to do. English law is largely a product of the labors of lawyers and judges who have lived accessible to one another, and mostly in or near the city of London. If we read the old reports we often come across memoranda such as the following resolution reported from the year 1584: "All the judges of England assembled at Sergeants' Inn agreed that if one break a glass in a window in the dwelling house of any one, and there with hooks draw carpets out and feloniously steal them, it is burglary, if it be done in the night." (Anderson 114.) And again, Lord Morly's Case, Kelyng 53: "Memorandum, all the judges of England met together at Sergeants' Inn in Fleet street, to consider of such things as might in point of law fall out in the trial of the Lord Morly, who was on Monday to be tried by his peers for a murder, and we did all *una voce* resolve the several things following.' Such memoranda as these illustrate the ease with which it was possible for a judge who might happen to be confronted with an unusual difficulty in his own work to call informally upon other judges for assistance and for suggestions. It must be remembered, too, that the judges who have taken part in the deliberations of the higher courts have throughout the whole period of English legal history been men who were also accustomed to go into the counties to preside in the trial courts. This circumstance was of great value in keeping the judges of the appellate courts in touch with the practical difficulties of the administration of justice before juries. We have in studying the practical workings of the American system often been impressed with the fact that the judges of our appellate courts are in a great measure insensible to the difficulties that beset the path of the trial judges, and are too often hypercritical in their attitude to the work done in the trial courts. Of course it will never be possible for there to be any such harmonious working together of the American judges in the building up of the case law generally in this country as is found in England; for not only do the judges of our different States belong to different jurisdictions, they are separated by such great distances from the field of one another's labors that we cannot expect them to give mutual assistance to one another as the English judges have done. We need never expect therefore to see a body of case law in this large country as homogeneous as the English law is with itself. But it is possible that, notwithstanding local differences, each system should be consistent and reasonable in itself; and there is every reason to believe that as time goes on this better condition will be realized.

In closing we wish to point out that one of the gravest faults of our case law is traceable to the effort to achieve a perfect justice instead of a practical and common-sense justice. In their enthusiasm for seeing the law administered without any irregularities or defects whatever, the courts have fallen into the way of scrutinizing the record as it comes from the lower court with a microscopic eye, and of reversing for what to the man of every-day action appear to be immaterial trivialities. If our judges had been content to be parties to the administration of a relative or approximately fair justice, the administration of law as it now exists would hardly have fallen into its present disfavor. One of the merits of the English system of administering law is that the English judges have never professed to be engaged in the attempt to attain perfection. The saving common sense of the Englishman has preserved him from the excessive idealism which threatens to be our own pitfall. But notwithstanding all of the defects of our American case law, we are fully convinced that the decisions of the American courts during the last hundred years constitute the records of one of the greatest chapters in the history of the development of the human intellect.

Observations Here and There.

ACCORDING to the advice of Lord Coke you ought never to rely upon a point of law when the facts are in your favor. *Per* Draper, J., in McLellan *v.* Rogers, 12 U. C. Q. B. 651, 653.

Admiralty "has been called the humane providence that watches over those who go down to the sea in ships and do their business on the great waters." *Per* Chief Justice Chase, in The Gary *v.* The Sherman, Chase (U. S.) 468, Fed. Cas. No. 5,259.

"It is seldom that an action can be decided by the consideration of but one principle of law; especially is such the case with regard to the awarding of writs of mandamus," said Mr. Justice Waterman, in Swift *v.* People, 63 Ill. App. 459.

In Canfield *v.* Chicago, etc., R. Co., (Iowa) 121 N. W. Rep. 186, the plaintiff, who was eighteen years old and a sectionman on defendant's railroad, earning $36.40 per month, was struck by a train and seriously injured. The jury awarded him $49,000, and a judgment therefor was affirmed, provided he should elect to accept a judgment for $25,000.

"The learned trial judge must have been very unfortunate indeed if he was guilty of committing as many errors as he stands charged with on this record. Fortunately for the administration of justice in his circuit, we are able to say that we think the defendant's counsel are seriously mistaken in supposing the trial to have been so replete with error." Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. Rep. 1, where the judgment of Circuit Judge Des Voignes was affirmed.

We noticed in a recently reported case that counsel in his argument to the jury said Mr. B., a witness on the other side, "would swear a hole through a two-inch plank." Evidently a strenuous oath. Why not adopt with a slight variation Shylock's remark to Gratiano (The Merchant of Venice, Act IV., sc. 1), and say that the witness "would swear the seal off a bond"? And, according to Peto, Falstaff declared he "would swear truth out of England." (King Henry IV., Part I., Act II., sc. 4.)

In Com. *v.* Matthews, 152 Pa. St. 166, 169, the Pennsylvania Supreme Court expressed the fear that too literal an interpretation and enforcement of the Sunday law (Act of 1794) would create an antagonism leading to its repeal or serious modifica-

tion. "There may be such a thing as excessive zeal in invoking its penalties in extreme cases. The act is in more danger from its friends than from its enemies." In Com. *v.* Shipley, 35 Pa. Co. Ct. 132, the putting in of an emergency switch on the line of a general system of a railroad on Sunday was held to be a work of necessity within the saving clause of the statute.

"The origin of the doctrine of 'the last clear chance' is generally attributed to the case of Davies *v.* Mann, 10 Mees. & W. 546." *Per* Sullivan, J., in Pilmer *v.* Boise Traction Co., (Idaho) 94 Pac. Rep. 432, 437. It is frequently called "the humanitarian doctrine," and sometimes the "last clear opportunity," the "discovered peril," or the "subsequent negligence of defendant" doctrine. In Hawkins *v.* St. Louis, etc., R. Co., 135 Mo. App. 524, 535, 116 S. W. Rep. 16, 19, Goode, J., said: "Our experience is that cases predicated on a breach of the rule of law requiring care to avert harm to a person whose negligence has exposed him to injury from what another is doing perplex appellate courts more than any other."

In Donahue *v.* Transfer Co., 141 Ill. App. 174, an action by defendant's employee to recover damages for personal injuries by being severely bitten by defendant's jackass, a judgment for the plaintiff was reversed, Holdom, P. J., saying: "There is a good deal of human nature in the jackass, and, while docile enough when kindly treated, the human attributes of resentment and brute retaliation are apt to be aroused when smarting under ill treatment and abuse. These latent instincts of the brute nature are developed by abuse and made manifest under provocation; and they are not confined to the brute creation. The jackass had for days suffered indignities and cruel treatment at the hands of plaintiff, and his attempts to retaliate by snapping and biting at plaintiff had failed. The jackass undoubtedly brooded under the insults of his tormentor and yearned for revenge. He watched his opportunity, and when the tormentor was off his guard and little dreaming of the retribution in store for him, the brute seized him and wounded him as before detailed. In this state of the case we can but voice the rule laid down in Keightlinger *v.* Egan, 55 Ill. 235, that 'if the plaintiff wantonly irritated and aggravated the dog and the dog bit him in repelling the aggression plaintiff should not be allowed to recover for damages caused by his own wrong.'"

In most of the States of the Union the constitutional name of the court of last resort is the "Supreme Court." But in Maine and Massachusetts it is the "Supreme Judicial Court;" in Connecticut, the "Supreme Court of Errors;" in New York, Maryland, Kentucky, and the District of Columbia, the "Court of Appeals;" in Virginia and West Virginia, the "Supreme Court of Appeals;" and in New Jersey, the "Court of Errors and Appeals."

In nearly every State the presiding judge is styled the "Chief Justice." But in Virginia and West Virginia, he is "President;" in South Dakota, "Presiding Judge;" and in New York, "Chief Judge." In Georgia there is a "Chief Justice" and a "Presiding Justice." The other members of the court are usually "Associate Justices." But in some States they are "Associate Judges," or simply "Judges" or "Justices."

Subjecting prisoners to the "third degree" is a practice that has been condemned by Canadian judges in at least two reported cases. In The Queen *v.* Viau, 7 Quebec Q. B. 362, 372, Judge Wurtele said: "The practice of constables and other peace officers deliberately and designedly cross-examining and harassing prisoners for the purpose of extorting confessions of guilt, or of getting evidence against them, is reprehensible and should be discouraged." In Rex *v.* White, 18 Ontario Law Rep. 640, 644, Judge Osler said: "I will add, speaking for myself, that the practice of police officers of any grade examining prisoners is to be disapproved of, and that the obtaining confessions or statements from them by trick or deception is to be strongly reprobated; the latter in particular tends to obstruct the course of justice by discrediting an officer whose testimony might otherwise be useful." See Moore on Facts, § 1045. "A policeman should keep his mouth shut and his ears open." *Per* Cave, J., in Reg. *v.* Male, (1893) 17 Cox 690. But *compare* Reg. *v.* Miller, (1895) 18 Cox 55, *per* Hawkins, J.

"Cases occasionally present themselves where a plaintiff or defendant is represented by incompetent counsel, and where the ends of justice require the trial judge to secure, so far as he can, a fair and full presentation of the case, so that the party who came into the court expecting to have a full, fair, and just examination of the facts in controversy will find his expectation realized. But where a party is represented by competent counsel — as the brief and oral argument demonstrate this plaintiff was — it would seem that the conduct of his side of the case had better be left to his own counsel. It is not unreasonable to assume that such counsel's study of the case and the information he possesses as to the personal equation of the different witnesses called against his client may make him a more competent cross-examiner than the trial judge, who never knew of the issues in the case till the pleadings were opened. Indeed, it might sometimes happen that a well-laid plan to discredit a hostile and unfair witness would be disarranged and rendered futile by premature cross-examination. The safer course would seem to be to allow the examination by counsel — direct, cross, redirect, and recross — to conclude, and then, if anything is obscure, if some point seems to be overlooked, or if, suspecting false swearing, he thinks cross-examination should be further pressed, the trial judge can, and indeed ought to, intervene so that the ends of justice may be subserved. Where, however, he takes the cross-examination out of the hands of competent counsel, there is danger that the jury, from this fact alone, may draw conclusions unfavorable to the witness and to the party on whose behalf the witness is called." Berwind-White Coal Min. Co. *v.* Firment, (C. C. A.) 170 Fed. Rep. 151, 154, *per curiam*, Lacombe, Coxe, and Ward, JJ.

Cases of Interest.

PARTIAL VALIDITY OF FEDERAL EMPLOYERS' LIABILITY ACT. — In El Paso, etc., R. Co. *v.* Guthierrez, 30 Sup. Ct. 21, the United States Supreme Court holds that the Federal Employers' Liability Act which has been declared invalid as applied to interstate commerce is constitutional so far as it relates to common carriers engaged in commerce within the Territories of the United States and the District of Columbia, and that the latter feature of the act is to be given effect separate from and independent of the interstate commerce feature. It is held that Congress would have enacted the provisions of the law applicable to the Territories and the District of Columbia even if it had not undertaken to deal with the relation of the States.

SALVAGE FOR SERVICES RENDERED VESSEL IN DRY DOCK. — In Simmons *v.* The Jefferson, 30 Sup. Ct. 54, the United States Supreme Court holds that a court of admiralty has jurisdiction of a libel claiming salvage for services rendered by tugs in extinguishing a fire communicated from shore to a vessel being repaired in a dry dock from which all water had been emptied.

The court decides that the right of the libelant to salvage is not defeated by the fact that the vessel was practically on shore and was not at the time an instrumentality of navigation subject to the dangers and hazards of the sea.

BUCKET SHOP TRANSACTION AS "GAME OF HAZARD" CONDUCTED WITH "GAMBLING DEVICE." — In Ives *v.* Boyce, 123 N. W. Rep. 318, the Nebraska Supreme Court holds that under a statute of that State authorizing the recovery back of money lost by any "gambling device or game of hazard of any kind," transactions in a bucket shop consisting of fictitious contracts of sale or purchase for future delivery of stocks with the intention and understanding that there shall be no delivery, but only a settlement by paying the difference of prices, do not constitute a game of hazard, and that a telegraph wire, blackboard, and ticker used by the broker in obtaining and publishing the rise and fall of prices in the market are not a gambling device within the meaning of those terms in the statute so as to authorize a recovery of money lost by such transactions.

LIABILITY FOR INJURIES CAUSED BY DOG PERMITTED TO GO ON RACETRACK. — In McClain *v.* Lewiston Interstate Fair & Racing Assoc., 104 Pac. Rep. 1015, the Supreme Court of Idaho held that where a person takes a dog to a racetrack or is in control of such dog near the track and suffers or permits such dog to go upon the racetrack and interfere with the riders in a race, resulting in an injury to one of them, the owner or person in control of such dog is guilty of negligence and is liable for the damages thereby sustained. It was recognized that the owner of a dog or domestic animal would not be liable for injuries done by the animal in a place where it might rightfully be taken or permitted to go, unless the owner knew that the animal was accustomed to do such mischief, but it was held that the defendant's dog in being on the racetrack was not in a suitable or proper place.

DEGREE OF CARE REQUIRED IN OPERATION OF SCENIC RAILWAY. — In O'Callahan *v.* Dellwood Park Co., 89 N. E. Rep. 1005, the Supreme Court of Illinois decides that persons operating an ordinary scenic railway in an amusement park are held to the same degree of care for the protection of the persons riding thereon as is required of common carriers of passengers. The court says that the degree of responsibility of the owners of a railway of this kind has not been considered in any other case so far as it is advised, but concludes that not only by fair analogy but on reason and sound public policy such owners should be responsible as common carriers. The argument that a scenic railway should not be considered a common carrier because its character was notice of its danger, and that its operation involved no danger to those who kept away from it, did not impress the court. Justices Cartwright and Dunn dissent.

PRIVATE GARAGE AS VIOLATION OF RESTRICTIVE BUILDING COVENANT. — In Beckwith *v.* Pirung, 119 N. Y. Supp. 444, the New York Appellate Division of the Supreme Court, Second Department, holds that a restrictive building covenant contained in the deed of each of the lots in a park, that neither the grantee nor his heirs or assigns shall erect upon any portion of the premises any building except a detached dwelling house of a certain description and of not less than a certain cost, and that there shall not be erected upon any portion of the premises any stable for horses or other animals, nor any pig sty, cow shed, hen house, slaughter house, "or other nuisance of any kind, description, or nature," is not violated either in letter or spirit by the erection of a private garage, one story high and about fourteen by seventeen feet in dimensions, to be used in connection with the dwelling house of the owner for storing his automobiles. It is held that this structure is incidental to the reasonable use of the property for residential purposes just as a greenhouse for flowers, or a private music room or art gallery, would be.

RIGHT OF INDORSER TO PLEAD USURY AGAINST HOLDER OF NOTE IN DUE COURSE UNDER NEGOTIABLE INSTRUMENTS LAW. — It seems to have remained an unsettled question in New York as to whether under the Negotiable Instruments Law an indorser of a usurious note can plead the usury as a defense to the note against a holder in due course. The rule prior to the Negotiable Instruments Law was that a note void in its inception for usury continued void whatever its subsequent history might be. The Supreme Court, Appellate Term, now holds in the case of Klar *v.* Kostiuk, 119 N. Y. Supp. 683, that, under the provision of that law that "every indorser who indorses without qualification warrants to all subsequent holders in due course that the instrument is at the time of its indorsement valid and subsisting," an indorser cannot interpose usury as a defense against the holder of a note in due course. Justice Lehman dissents on the ground that the Negotiable Instruments Law was simply intended to put into statutory form the law as established by commercial custom and declared by the courts, and that the holder of a usurious note is not a holder in due course within the meaning of the act.

CONSTRUCTION OF IOWA CIVIL RIGHTS ACT. — In Brown *v.* J. H. Bell Co., 123 N. W. Rep. 231, the Supreme Court of Iowa was called upon to construe the Civil Rights Act of that State providing that "all persons within this State shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, chop houses, eating houses, lunch counters, and all other places where refreshments are served, public conveyances, barber shops, bath houses, theatres, and all other places of amusement." The defendant was a coffee merchant who had rented space in a food show and was conducting a booth where he served coffee, gratis, to patrons of the show, for advertising purposes. The plaintiff was a negro who had paid an entrance fee and was attending the show and was refused service by the defendant. It was held that the defendant's booth did not come within the words of the statute "other places where refreshments are served," that it was not a "place of amusement," and that the defendant could serve whom he pleased and was not liable for refusing to serve a negro. It was further held that the act, though valid as applying to businesses of public accommodation and entertainment, had no application to a business of a private nature such as the defendant was conducting. Chief Justice Evans and Justice Weaver dissent.

LIABILITY OF BANK TO DEPOSITOR FOR MONEY DEPOSITED WITH SLIP BEARING NAME OF ANOTHER PERSON. — In Schwartz *v.* State Bank, 119 N. Y. Supp. 763, the New York Appellate Division of the Supreme Court, First Department, had before it a case of unique facts and said to be without controlling precedent. The plaintiff, a customer of the defendant bank, presented a number of checks for deposit, together with a deposit slip, and his bank book. The deposit slip, by some mistake of the plaintiff, was headed with the name of another customer of the bank. The receiving teller, following the usual custom, entered the aggregate of the deposit in the plaintiff's bank book and handed it back to him. The deposit slip was placed on file, and later in the day the deposit was credited to the customer whose name appeared on the slip. Some time later, when the bank sent the plaintiff a statement of his account the error was discovered and the plaintiff sued the bank for the amount. The court concluded that the bank book of the plaintiff, being merely a series of receipts, was open to explanation; that it did not constitute the account between the plaintiff and the bank; that the mere fact that he paid the money into the bank did not create the relation of debtor and creditor between the plaintiff and the bank, and that the deposit slip bearing the other customer's name amounted to a direction to the bank to credit the money to such other

customer. It was therefore held that the plaintiff could not recover, and the decision of the Appellate Term of the Supreme Court was reversed.

LIABILITY TO AUTOMOBILE PASSENGER FOR INJURIES CAUSED BY DEFECTIVE HIGHWAY — CONTRIBUTORY NEGLIGENCE. — In Lauson *v.* Town of Fond du Lac, 123 N. W. Rep. 629, the Supreme Court of Wisconsin had before it a suit brought by an occupant of an automobile for injuries caused by running the car into an opening in the highway. The automobile carried only one light and was running at a speed not to exceed eight miles an hour. The opening into which the car ran was guarded by a barrier about four feet above the surface of the road, and the car broke through this. It appeared from the testimony that the driver could not see objects more than ten or twelve feet ahead of him, and that at the speed at which the car was going it could not be brought to a standstill within less than fifteen or twenty feet. The court held that there was such evidence of contributory negligence on the part of the driver of the car as to preclude a recovery, and said: "It seems to us, and we decide, that the driver of an automobile, circumstanced as was the driver of the car in which the plaintiff was riding, and operating it under such conditions as he operated his machine on the night of the accident, is not exercising ordinary care if he is driving the car at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him. If his light be such that he can see objects for only a distance of ten feet, then he should so regulate his speed as to be able to stop his machine within that distance; and, if he fails to do so, and an accident results from such failure, no recovery can be had. This, it seems to us, is the minimum degree of care that should be required."

WHAT IS A "BOOKMAKER"? — The suppression of race track gambling in the State of New York depends upon a statute providing that "any person who engages in . . . bookmaking at any time or place; or any person who keeps or occupies any room, shed, tenement, tent, booth . . . or any part thereof, or who occupies any place or stand of any kind, upon any public or private grounds within this State, with books, papers, apparatus, or paraphernalia, for the purpose of recording bets or wagers . . . and any person who records bets or wagers . . . upon the result of any trial or contest of skill, speed, or power of endurance of man or beast . . . is guilty of a misdemeanor." In a prosecution under this statute the New York Court of Appeals holds in People *v.* Langan, 89 N. E. Rep. 927, that a person at the race track who has no books or papers and does not occupy any building or tent and records no bets, but who simply offers orally to those present to bet upon a horse or horses that are about to engage in a race in which he lays odds, and so bets, is not a bookmaker within the meaning of the statute. The view of the court is that the purpose of the statute was to abolish the practice of registering bets and odds by which the person offering to bet could make odds enabling him to win and causing the public to lose. The court says: "The vice of bookmaking chiefly consists in soliciting and in the inducing the public to take chances in the carefully figured and planned scheme of a bookmaker, and this, in order to be profitable to him, requires the writing out of the list of the odds laid on some paper or material so that they can be seen by those who are solicited to invest." Mr. Justice Vann dissents, being of the opinion that the substance of the crime of bookmaking may be committed with or without a record, the record being merely evidence of the odds quoted and an aid to memory.

VALIDITY OF RE-ELECTION OF OFFICER, REMOVED FOR MISCONDUCT IN OFFICE, TO FILL HIS UNEXPIRED TERM. — In People *v.* Ahern, 89 N. E. Rep. 930, the New York Court of Appeals held that the defendant Ahern, who had been duly elected borough president of the borough of Manhattan for the term of four years and who, about two years afterward, had been duly removed from that office by the governor of the State, on charges heard, for maladministration and incompetency, could not be reappointed by the board of aldermen of the city of New York, representing the borough of Manhattan, to fill the vacancy thereby created for the remainder of his unexpired term. The power of the governor to make the removal and the regularity of the proceedings were not challenged. But it was contended that the power to reappoint the defendant resided in the board of aldermen by virtue of a provision of the city charter that "any vacancy in the office of president caused by removal from the borough or otherwise shall be filled for the unexpired term by an election to such vacancy made by a majority vote of all members of the board of aldermen," and that his removal by the governor neither debarred the board of aldermen from appointing him for his unexpired term nor disqualified him from accepting such appointment. The majority of the court took the view that the inconsistent and absurd results of authorizing the governor to try and remove a public officer as unworthy to hold office and of authorizing the board of aldermen to select him forthwith as a proper person to fill the vacancy could not have been intended by the legislature, and it was held therefore that the removal disqualified the defendant for the remainder of his term and that his reappointment was invalid. Mr. Chief Justice Cullen and Mr. Justice Chase dissent on the ground that the legislature had not declared that the removed officer should not be eligible for reappointment and that the court could not say as a matter of law that removal from office disqualifies from reappointment to fill the vacancy where there is no statutory provision to that effect.

New Books.

THE RATIFICATION OF CONSTITUTIONS.

The People's Law; or, Popular Participation in Lawmaking. By Charles Sumner Lobingier, Ph.D., LL.M. Pp. xxi + 429. New York: The Macmillan Co., 1909. $4.00 net.

The author of this important contribution to constitutional — or perhaps it would be more strictly accurate to say institutional — history has been for some years Judge of the Court of First Instance of the Philippine Islands, and at various periods of his career has served as a commissioner of the Nebraska Supreme Court, professor of law in the University of Nebraska, member of the National Conference of Commissioners on Uniform Laws, and in other important positions. He is also the author of a number of valuable articles in the American and English Encyclopædia of Law, second edition, and it was during the preparation of the title "Constitutional Law" for that work, in examining into the validity of the constitutions then recently proclaimed in certain of the Southern States, that he received the inspiration that led to the historical researches of which the volume before us is the result.

It is a fact universally recognized, and admitted by all the commentators, that the American people are to be credited with at least three notable contributions to political science and the political organism — the constitutional convention, the written constitution, and the concrete system of constitutional law. This is so although the constitutional convention has to a limited extent its prototypes in the English revolutionary and convention Parliaments of 1399, 1660, and 1689; although there are forerunners or even partial examples of the written constitution in Magna Charta, the Bill of Rights, the Constitutions of Clarendon, and other instruments intended to guarantee fundamental rights and to have a sanction higher than that of

ordinary statutes; and although the term "constitutional law" has been more or less inaccurately applied in recent times to statements of certain fundamental principles of the British government and to recitals of established royal prerogatives (see "The Laws of England," vols. 6 and 7, reviewed in these columns in August, 1909).

To trace the origin and discuss the necessity of direct participation by the people in the constitutional convention and in the framing and adoption of the organic law has been Judge Lobingier's task. His book is neither a history of constitutions nor of constitutional conventions; it is a history of the people's part in these institutions and an analysis of the blending of the old and the new — the dual existence of conservatism and radicalism — which is everywhere and in all stages of progress to be found in the institutions as developed in America.

The proposition that Judge Lobingier puts forward as a thesis is this: "The complete evolution of legislative sovereignty . . . appears to constitute a cycle. Beginning with a system more or less popular, we find this succeeded by a monarchical and then a delegate system, which in turn are supplanted by one completely direct and popular." The tendency toward a renewal of the "completely direct and popular" participation in legislation referred to is the system of initiative and referendum, to which two short chapters toward the end of the book are devoted. As to the probability of this system supplanting that now in vogue, however, it does not seem to the writer that Judge Lobingier has made out a case on the evidence.

In tracing the history of popular participation in lawmaking, Judge Lobingier starts with the primitive popular assembly or folkmoot, and follows this system's gradual loss of its functions through the growth of aristocratic and monarchic tendencies, to the revival of its principles as exemplified particularly in American institutions.

But it is in the church covenant, as developed by the Anabaptists of Germany and Switzerland and maintained by the later Calvinists of other countries, that Judge Lobingier finds the germ of the popular written constitution as it has been evolved in America. To this view, however, Judge Lobingier by no means lays any claim of originality, for the idea, at least as far as Calvin is concerned, has been expounded by historians and commentators almost without number. "The American government and constitution," says Bryce in The American Commonwealth, are "based on the theology of Calvin and the philosophy of Hobbes."

The colonial experience with the "common assent" doctrine in lawmaking led naturally to the adoption of the same principle when the movement for written constitutions, state and federal, took form and effect. The claim that the germ and forerunner of the written constitution was the provincial charter is totally unfounded, according to Judge Lobingier's view. The facts that both were written and that some of their phraseology was similar are merely formal matters. Intrinsically and historically the two were widely different. The charter was a recital of concessions from a superior to an inferior, while the constitution was an agreement among equals. The people were never invited to suggest, much less sanction, a charter.

Chronologically, the history of popular ratification may be divided into three periods. In the first, lasting from 1776 to 1821, constitutions were generally, though not always, adopted without submission to the people; but this, the author believes, was not because popular ratification was not thought of — rather because those instruments were generally regarded as only temporary in character and having at most the force of ordinary legislative acts. During this period no less than twenty-six State constitutions were adopted, only six of which, all framed in the New England States, were ratified by the people.

A second period covers the decade between 1821 and 1831, and is a period of transition, during which the practice of popular ratification became established. Six commonwealths effected or attempted changes in their fundamental codes during this period — three by consulting the people and three without, the three former being, Judge Lobingier says, "the more influential."

In the third period, lasting from 1831 down to the close of the reconstruction era, popular ratification became general, only two permanent constitutions being adopted without receiving or recognizing popular ratification. At the close of this period the only unratified State constitution remaining was that of Delaware, enacted in 1831. All of the others put in force without ratification had gone by the board. "Of the ten constitutions proclaimed during the first two years of American independence, the two earliest were displaced within two years, barely one-half survived the eighteenth century, and most of these soon became the objects of popular dislike and attack."

From this history Judge Lobingier deduces the conclusion that the constitution which lacks the people's ratification is essentially ephemeral, and that the only enduring form of organic law is "that which is builded on popular sovereignty and sealed with popular approval." The oldest existing American constitution (though not the earliest), and the only one of the Revolutionary period which has lasted to the present day, is that of Massachusetts, in the making of which the electors participated "to an extent never surpassed before or since," and which "has been a model, both in form and substance, for all subsequent constitution makers." And the few older States which to-day retain their original constitutions, like Maine and Wisconsin, are those in which the people were consulted at every step and allowed the fullest expression of their wishes.

Beginning with Mississippi in 1890, and continued by the States of South Carolina, Louisiana, Delaware, and Virginia, in the order named, a movement has taken place which Judge Lobingier unhesitatingly pronounces one of retrogression. Political conditions peculiar to the south have induced those States to abandon the established practice of popular ratification of fundamental law, and to promulgate constitutions to which the people at large have had no opportunity of expressing by vote either their assent or their disapproval. All of these constitutions have been attacked in the courts, but their binding force has been uniformly upheld, notwithstanding the fact that in the case of several of them, notably that of Virginia, it was understood and expected by the people that the work of the constitutional convention would be submitted to the whole people for their judgment at the polls.

Judge Lobingier's book concludes with five short chapters on "Popular Participation in Lawmaking Outside of the United States," an appendix containing a comprehensive bibliography and a table of cases cited, and an adequate index. Typographically the work is thoroughly satisfactory, and the author's simple, direct, and lucid literary style makes the book extremely attractive aside from its high intrinsic value. H. H V. D.

News of the Profession.

THE FLORIDA STATE BAR ASSOCIATION will hold its annual convention in Tampa on February 23 and 24.

THE NEW YORK STATE BAR ASSOCIATION held its thirty-third annual meeting in Rochester on January 20 and 21. Details of the meeting will be given next month.

THE KANSAS STATE BAR ASSOCIATION held its annual meeting in Topeka on January 27 and 28. An account of the meeting will be given in this column next month.

THE UTAH STATE BAR ASSOCIATION held its twelfth annual meeting on January 10 in Salt Lake City. Addresses were delivered by President Le Grand Young, S. L. Richards, E. A. Walton, and others.

DEATH OF EX-ATTORNEY-GENERAL OF ILLINOIS. — Howland J. Hamlin, former attorney-general of Illinois, died at his home in Shelbyville on December 13, aged fifty-nine. He held office during the administration of Governor Yates, having been elected in 1900.

LE BOEUF APPOINTED TO NEW YORK COURT. — On December 7 Governor Hughes appointed Randall J. Le Boeuf, of Albany, to be a justice of the New York Supreme Court, Third Judicial District, to succeed the late Justice George H. Fitts. Judge Le Bouef is forty years of age.

EX-ATTORNEY-GENERAL OF MISSOURI DIES. — D. H. McIntyre, former attorney-general of Missouri, died in Mexico on January 1, at the age of seventy-six years. He was elected attorney-general in 1880, serving during the administration of Governor Crittenden. Ten years ago he lost his eyesight.

PROMINENT MINNESOTAN DEAD. — Hon. D. B. Searle, former United States district attorney for Minnesota, and one of the most eminent members of the bar of that State, died at his home in St. Cloud on December 13. For fifteen years he was judge of the seventh judicial district of Minnesota. Judge Searle was sixty-three years old.

FORGOT HIS SPEECH AND KILLED HIMSELF. — Because his memory failed him when he rose to make an after-dinner speech in Georgetown, Ky., on January 1, Judge John C. Vovis, of Danville, Ky., committed suicide by shooting himself through the head. Judge Vovis was regarded as one of the coming men of Kentucky.

FEDERAL DISTRICT ATTORNEYS RESIGN. — On December 31, A. G. Avery, of Spokane, Wash., resigned his office as United States Attorney for the Eastern District of Washington. On January 5, Hon. Reese Blizzard tendered his resignation from the district attorneyship for the Northern District of West Virginia.

OHIO LAWYERS WANT JUDGES APPOINTED. — At a meeting of the committee on judicial administration and legal reform of the Ohio State Bar Association, held in Columbus on December 30, a resolution was adopted recommending the appointment of Supreme Court judges by the governor instead of election by the people.

PENNSYLVANIA LAWYERS TO MEET AT CAPE MAY. — On December 28 the officers and executive committee of the Pennsylvania State Bar Association met in Reading to make arrangements for the next annual meeting of the association. It was decided to hold the meeting at Cape May on June 28, 29, and 30.

JUDGE VAN EPPS, OF GEORGIA, DEAD. — Judge Howard Van Epps, one of the most distinguished members of the Georgia bar, died suddenly at Lake City, Fla., on December 25, aged sixty-two years. Judge Van Epps was perhaps most widely known as the author of a digest of the Georgia reports. For eight years he was judge of the City Court of Atlanta.

TEXAS JUDGE RESIGNS — HIS SUCCESSOR. — On January 1 Judge M. M. Brooks retired from the bench of the Texas Court of Criminal Appeals. He is succeeded by Hon. Felix J. McCord, who is promoted from the office of assistant attorney-general. To fill the latter office the governor has named John A. Mobley, of Henderson county.

EX-CHIEF JUSTICE OF FLORIDA DIES IN NEW ORLEANS. — Hon. Benjamin S. Liddon, former chief justice of the Supreme Court of Florida, died in New Orleans on December 21, aged fifty-six. He was admitted to the bar in 1875 and rapidly rose to prominence. He became chief justice in 1894, but resigned from the bench in 1897, and resumed private practice. In 1903 he was made chairman of the commission for the revision of the statutes of Florida.

DEATH OF PROMINENT NORTH CAROLINIAN. — Hon. W. P. Bynum, a former justice of the North Carolina Supreme Court, died in Charlotte on December 30, aged eighty-nine. When the Civil War broke out he entered the Confederate army and rose to the rank of colonel, but in 1863 retired to assume the position of solicitor for the Western District of North Carolina. In 1873 he was appointed to the bench of the State Supreme Court by Governor Caldwell.

DEATH OF JUDGE ZOLLARS, OF INDIANA. — Hon. Allen Zollars, a justice of the Indiana Supreme Court from 1882 to 1888, died at his home in Fort Wayne on December 21, at the age of seventy years. Judge Zollars was a native of Ohio and was graduated from Denison College, Ohio, in 1864. Two years later he received his law degree from the University of Michigan Law School. After his retirement from the bench he practiced his profession with great success in Fort Wayne.

MR. JUSTICE LURTON TAKES HIS SEAT. — On December 20 the Senate confirmed the nomination of Horace H. Lurton, of Tennessee, to be a justice of the United States Supreme Court. A few days later Judge Lurton tendered to the President his formal resignation as circuit judge, and on January 3 he was sworn in. It is said that the average of beauty on the Supreme Court bench has been raised considerably by Mr. Justice Lurton's accession, as he is a markedly handsome man.

CUSTOMS COURT JUDGES. — On January 5 President Taft sent to the Senate the nominations of members of the new court of customs appraisers, authorized under the Payne tariff law. The presiding judge is Judge Alfred C. Coxe, at present United States circuit judge for the Second Circuit. The associate judges are William H. Hunt, United States district judge for Montana; James F. Smith, an ex-judge of the Philippine Supreme Court and former governor-general of the islands; O. M. Barber, of Vermont; Marion Devries, chairman of the board of general appraisers at New York.

NEBRASKA STATE BAR ASSOCIATION. — The tenth annual meeting of the Nebraska State Bar Association was held in Omaha on December 28 and 29. President Brogan presided, and his annual address was the feature of the first day. Hon. Charles B. Letton, of the Nebraska Supreme Court, and C. S. Elgutter, of Omaha, read papers on the second day. The principal address was to have been delivered by James R. Garfield, former secretary of the interior, but he was unable to be present. The association adopted the code of ethics recommended by the American Bar Association. The meeting concluded with the usual banquet.

UNITED STATES ATTORNEYS APPOINTED. — During December President Taft sent to the Senate the following nominations for federal attorneyships: Asa P. French, for Massachusetts, renominated; Joseph E. Morrison, for the Territory of Arizona; Robert T. Devlin, for the Northern District of California; Marion Erwin, for the Southern District of Georgia; William E. Trautmann, for the Eastern District of Illinois; William A. Northcott, for the Southern District of Illinois; Robert T. Whitehouse, for Maine; Arba S. Van Valkenburgh, for the Western District of Missouri; Ernest F. Cochran, for South Carolina.

VIRGINIA'S ATTORNEY-GENERAL IN TROUBLE. — Judge Samuel W. Williams, who on January 1 assumed the office of attorney-general of Virginia, has been causing some grief to the good people of his native State by getting himself indicted in West Virginia. It seems that during the course of a trial in McDowell County, W. Va., Judge Williams became incensed at

some remarks from Hon. Joseph M. Saunders, an ex-justice of the West Virginia Supreme Court, and fired an inkpot at that worthy jurist with telling effect. For which unlawful conduct the grand jury of McDowell county brought in an indictment against Judge Williams.

GEN. PICKLE EXONERATED. — The Tennessee Court of Civil Appeals, sitting at Knoxville, has recently reversed the judgment of disbarment pronounced against Gen. G. W. Pickle of that city by Circuit Judge Sneed, acquitting Gen. Pickle of all the charges preferred against him and dismissing the proceeding with costs. The trouble grew out of a letter written by Gen. Pickle, who was formerly attorney-general of the State and for a number of years State reporter, to the Knoxville *Sentinel*, wherein he contended that Judge Sneed had no legal authority to hold the Chancery Court for Knox county. The court said: "In our opinion Gen. Pickle was clearly within his rights and guilty of no impropriety which even subjects him to a reprimand."

MASSACHUSETTS BAR ASSOCIATION ORGANIZED. — On December 22 at the Hotel Somerset, in Boston, some 450 Massachusetts lawyers met and organized the Massachusetts State Bar Association. Richard Olney presided, and addresses were delivered by him and by Chief Justice Marcus J. Knowlton, of the State Supreme Court; William B. Hornblower, of New York; Samuel J. Elder, of Winchester; and William H. Brooks, of Springfield. Officers were elected as follows: President, Richard Olney, of Boston; vice-presidents, William H. Brooks, of Springfield; Charles W. Clifford, of New Bedford; Samuel K. Hamilton, of Wakefield; John C. Hammond, of Northampton; Alfred Hemenway, of Boston, and Moorfield Storey, of Lincoln; secretary, Robert Homans, of Boston; treasurer, Charles E. Ware, of Fitchburg. The new association is expected to enroll about seven hundred members at once.

NO WOMEN LAWYERS FOR RUSSIA. — The right of women to practice law having been fought out and settled in other civilized countries has now come up in Russia and has been choked off in typical Russian fashion. A certain Mme. Fleischutz, after receiving a diploma from one of the university law schools, began attending the sessions of the court. In the Court of Criminal Sessions during November a prisoner, having been directed by the judge to choose a lawyer to conduct his defense, designated Mme. Fleischutz, who immediately arose and said: "I accept." Then and there she would have become the first practicing woman lawyer in Russia, had not the crown prosecutor made a vigorous protest and threatened to withdraw if she were allowed to conduct the defense. A great controversy at once arose, the woman claiming that there was nothing in the laws of Russia prohibiting women from practicing, while the prosecutor maintained that the very absence of such an express prohibition was in itself proof that the existence of a woman lawyer was not contemplated by the law. Finally the judge concluded that the problem was too much for him, so he certified the matter up to the Minister of Justice, who in turn passed it on to the Senate, which body decided that women were incompetent to appear as barristers. Thereupon the Court of Appeals, as a disciplinary body, ordered Mme. Fleischutz to be disbarred, and there the matter rests for the present.

TRESPASSER BITTEN BY HORSE — OWNER NOT LIABLE. — In Lowery *v.* Walker (noted in the *Law Journal* for December 11, 1909, at page 745) the Court of Appeal held that the owner of a horse was not answerable in damages for its conduct in biting a man who was trespassing in the field in which the animal was confined.

English Notes.

JAILERS MAY FORCE FOOD INTO SUFFRAGETTES. — The attempt of the militant suffragettes to obtain redress from those heartless prison officials who forcibly inserted food into their fair charges when the latter sought to secure their release by declining to eat, has been frustrated by a ruling rendered during December by the lord chief justice. In the case of Leigh *v.* Gladstone his honor charged that it was the duty of prison officials to preserve the health, and *a fortiori* the lives, of prisoners in their charge, and the jury found that the measures taken by the jailers in that case to nourish a recalcitrant suffragette were necessary to preserve her health and life, and were properly carried out. On this ruling and finding an action for assault by forcible feeding was dismissed.

A DAMAGE-PROOF REPUTATION. — A libel action brought against the London *Standard* by the Messrs. Cadbury, the widely known cocoa manufacturers, resulted in a somewhat surprising verdict recently. The newspaper accused the Cadburys of deliberate hypocrisy in posing as philanthropists and, while continuing to purchase cocoa produced by slave labor, purporting to take steps, which were of an ineffective nature, to obtain a mitigation of the evils. The defendants "stood to their guns" and strongly insisted that their charges were true. The jury returned a verdict in favor of the Cadburys, but awarded them only one farthing damages. A similar verdict, it may be remembered, was returned in the noted libel suit brought by the American artist Whistler against John Ruskin.

UNINTENTIONAL LIBEL. — The House of Lords in the recent case of Hulton *v.* Jones (noted in the *Law Journal* for December 11, 1909, at page 744) has established the doctrine in England that if one uses defamatory language which people may reasonably think is intended to apply to a particular person, such person may recover damages for the libel, notwithstanding the language used was in fact not intended to apply to him, and even though the defendant may not have known of the plaintiff's existence. "He may," says the *Law Journal* editorially, "have intended in a book to describe a purely imaginary person; but if a real person thinks that the cap fits him, and can call a few witnesses who can testify that they came to the same conclusion, there is nothing to prevent a jury from awarding him substantial damages against the unfortunate author or his publisher. The rule even makes it possible for several persons successfully to maintain actions against the same defendant, though it may be clear that he only intended to refer to a single individual."

TARRED WITH THE SAME STICK. — It has become such a popular pastime in this country to bemoan the law's delay and point to the courts of England as an illustration of what a judicial system really ought to be, that we take peculiar pleasure in printing the following excerpt from a recent number of London *Law Notes:* "To see oneself as others see one is always considered advice which is likely to take one's conceit down. The President of the United States, however, sees much in us likely to cause us self-satisfaction. In his address to Congress he said: 'The expedition with which business is disposed of both on the civil and criminal side of the English courts under modern rules of procedure makes the delays of our courts seem archaic and barbarous.' One rubs one's eyes in astonishment. Does the President read English newspapers? Is he aware of the discontent in this country with the law's delay? Does he know that only quite lately have the authorities consented to appoint new judges to relieve the congestion in the King's Bench Division? If the President knows all this, and still thinks his opinion correct, then American courts must indeed be 'archaic and barbarous.'"

THE DECEASED WIFE'S SISTER COMES BY HER OWN. — The right of a widower to marry his deceased wife's sister and live with her in unity and Godly love without let or hindrance from the authorities, temporal or spiritual, has been finally established by the Court of Appeal in the case of Rex *v.* Dibdin (noted in the *Law Journal* for December 18, 1909, at page 764). The controversy arose out of an attempt by a clergyman to exclude from the Holy Communion a man who had espoused his deceased wife's sister, on the ground that he was an open and notorious evil-liver. It was contended in behalf of the parson that the Act of 1907 merely validated such a marriage "as a civil contract," and that this did not affect the religious aspect of a union which was declared by 28 Henry VIII., c. 7, to be incestuous and against the law of God. In answer to this Lord Justice Farwell dryly remarked that the mere statement in an Act of Parliament that any specified thing is contrary to the law of God does not make it so in fact. The court held that the law of England regards marriage solely as a civil contract, though one of a peculiarly solemn kind affecting the status of the parties. "I have looked in vain," said Lord Justice Fletcher Moulton, "through all the decisions to which we have been referred, to find any authority for holding that marriage is, in the eye of the law, anything other than or beyond this." The decision is regarded as highly important, affirming as it does the principle that the clergy must accept the moral code which underlies the law of the land, and asserting unmistakably the exclusive right of the state, as against any religious denomination, to determine the marriage laws of the country.

When the Master of the Rolls pronounced judgment in this case he made some rather tart remarks regarding clergymen who had conscientious scruples against solemnizing such marriages. He said: "No man has a right to become a clergyman of the Church of England who is not prepared to perform the lawful duties of that office. For instance, one of such duties is the solemnization of marriage of parishioners unless there be lawful cause for refusing. That one of the parties has been divorced and seeks to marry again during the lifetime of the former spouse is unquestionably not such lawful cause in the case of the innocent party, because such remarriage is expressly permitted by the statute, and the clergyman is compellable to solemnize such a marriage of a parishioner if called upon so to do. If, then, a person conscientiously holds that marriages cannot be dissolved, or that if dissolved neither of the parties may marry again in the lifetime of the other (an opinion held by many members of the Church of England), and if the solemnization of such a marriage would do violence to his conscience, he should abstain from entering holy orders, for if he do so he certainly comes under the legal obligation to solemnize them. Similarly, if he considers that a man who marries his deceased wife's sister is living in a state of sin and should on that account be refused the communion, he ought to remember that in taking holy orders he becomes a minister of a church which is unquestionably bound by law to treat such marriages as lawful for all purposes if made under the Colonial Marriage (Deceased Wife's Sister) Act of 1906, so that, as admitted by counsel for the appellant, persons so married cannot be refused the communion. This being so, I cannot say that I feel much sympathy with a delicacy of conscience so eclectic that it is willing to bear the strain of treating persons so married as reputable members of the Church of England in a case where the marriage is between inhabitants of a colony, but finds unbearable the burden of treating them as such when the marriage is between inhabitants of this country, where it is equally in accordance with the law."

Incidentally it may not be amiss to note that, while the deceased wife's sister may now be married with impunity, marriage with a deceased husband's brother is still declared by the law of England to be incestuous and against the law of God.

Obiter Dicta.

HIGHLY PROBABLE. — "It may be assumed that a man can recognize his mother-in-law when he sees her." Hirschberg, P. J., in Matter of McInnes, 119 N. Y. App. Div. 443.

AN INFAMOUS CRIME, PERHAPS. — In Foster *v.* Wilhusen, 14 Misc. (N. Y.) 520, it was contended by the defendant that the number of children borne by a woman was a circumstance affecting her credibility.

AN INDEPENDENT JAIL. — It may be comforting to some of our criminally inclined subscribers who reside in New York city to know that on one of the portals of the Tombs prison in that city appears the following inscription: "No admittance between 2 and 4 P. M."

A PUZZLING CLASSIFICATION. — In Shanley *v.* Wells, 71 Ill. 78, the court upheld an instruction to the effect that it did not constitute vagrancy merely to "visit a house of ill-fame, drinking saloon, railroad depot, or other place of bad repute." What kind of railroad depots do they have in Illinois?

MANY SUCH. — A Boston lawyer whose practice is confined to petty criminal cases was recently endeavoring to persuade a convicted and disgusted client to appeal. "I will file a bill of exceptions," he said, "that will be a winner." "Huh," responded the client, "you couldn't file a saw."

A PECULIARITY OF PERSONALTY IN GEORGIA. — Personal property appears to possess an unusual attribute in Georgia. By section 5100 of the Georgia Code of 1895 it is provided that when any action is pending "for the recovery of personal property, the issue of said property born, or to be born" subsequent to the commencement of the action may be recovered therein.

A SCOTCH ACQUITTAL. — A jury in Queens county, N. Y., which had been trying an Italian on a charge of carrying concealed weapons, brought in a verdict of not guilty and at the same time handed the judge the following recommendation: "The jury requests your honor to caution this defendant that he should not carry knives or other dangerous weapons in future."

HE HAD A FAMILY. — In the case of State *v.* Brown, 5 Harr. (Del.) 505, a witness testified as follows: "I have a family; a wife and children. I have had fifty-one children by three wives; fourteen by the first, fifteen by the second, and twenty-one by the third, all born alive." Under the circumstances it is not surprising that the witness was slightly inaccurate in calculating the total of his output. What is one among so many?

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NOT TO BLAME. — In one of the Circuit Courts of Oregon recently an attorney moved for the continuance of a cause to a subsequent term, asserting a number of reasons for the postponement of the hearing all of which he declared were matters beyond his control. The attorney for the other side suggested that the cause be tried at the end of the term, but this he objected to on the ground that his client's wife was expecting an addition to her family about that time, "which," he concluded, "is not my fault."

PIGS IS PIGS. — In Ward *v.* Hobbs, 4 App. Cas. (Eng.) 13, the plaintiff sought to recover damages because certain pigs bought by him from the defendant had proved to be diseased, and it was argued in his behalf that the property sold was not really a lot of pigs but a mass of disease — of typhoid fever. Regarding this contention the Lord Chancellor said: "A pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man."

A STRAIN ON CREDULITY. — As illustrating the skeptical attitude of an equity court toward an attempt to explain away a combination of suspicious circumstances, Judge Dent, in Farley *v.* Bateman, 40 W. Va. 540, remarked: "A boy may satisfy his mother that his wet hair is the result of sweat, and not of his going in swimming contrary to her commands, but he will hardly convince her that his back and arms were sunburned, and his shirt turned wrong side out, in crawling through a rail fence backwards."

NUNCUPATIVE WILL ADMITTED TO PROBATE. — In the Surrogate's Court of Kings county, on December 7, Surrogate Ketcham admitted to probate the nuncupative will of a mariner. The testator, a marine engineer, who was afflicted with a chronic malady, suffered a severe seizure while on the high seas and, fearing that his end was near, told the captain and mate of the vessel that in case of his death he wished all of his possessions to go to his stepdaughter. He lived until the end of the voyage and died on the cars while proceeding to his home after landing. On proof of these facts the surrogate admitted the will to probate.

JUDICIAL NOTICE OF MULE'S PROCLIVITIES. — In Tolin *v.* Terrell, (Ky.) 17 S. W. Rep. 290, the court said: "In spite of the fact that there was testimony to show that this mule was of so gentle a disposition that children could play at its heels, it is a matter of common knowledge and common experience that there is no telling when or under what circumstances a mule will or will not kick. The only way to escape danger from the feet of a mule is not to go within the radius of its heels. He who goes within these limits assumes the risk of being kicked; and especially so when, without warning to the mule, he picks up the lines, which have been lying on the floor, passes them across the mule, and attempts to tie them at the brake."

A COUNTERCLAIM. — A Fort Smith, Ark., attorney who was seeking to collect a claim for $800, being a balance due for rent, received the following letter from the delinquent tenant:

"Mr. A. C. CUNKLE Attorney at law fort. Smith. ark Please ser your valubel comunitaion of the first and 12. at hand and will say in reply that when i rented mr H, A. Worstman house on 18. there was to be a bath tub out in the house in the rear of the lott but when i moved there and com to want to uese it i found it out of order and caled his atention to same asking the repair of same and he said that he would see what a bout it but that was as fare as he went so there fore i lived there ayear the use of the bath would of bin worth to me at least 50c per weak so it would leave an acount or a balance

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deduction your $8 a balance due me of $18 and besides that about too months before imoved he sent men there and toren down the front fence with out eaven saing a word for the purpos of laing a new walk tore out the stone walk in front and so far it is not laide or was not a few dayes ago dis enconvance my self and famly of whic iclaim abill of $5 onthat acount making the balanc due me of $23 by which if you are in the collection buisness i wish that you would credit me for same and colect balance & oblige A. J. Willett"

A FLIPPANT BAIL BOND. — The following bail bond was filed in the Circuit Court of Union county, Oregon:

An indictment having been found, procured or made by a lot of men in secret conclave known as Grand Jurors of the Circuit Court of the State of Oregon, for Union County, on the —— day of October, 1879, charging a highly respectable citizen of Union County with having perpetrated a crime, to wit: The crime of gambling or backing his usual good judgment with an article of intrinsic value, and upon due consideration had by the Court, he the aforesaid E. S. McComas having been admitted to bail and granted the privilege of running at large for a little season, upon the filing in said Court of a good and sufficient bond in the sum of $100.00.

Therefore we, L. A. Blacker, a resident of Union County, Oregon, by occupation, a general rustler on all corners, and L. Remillard, a vendor of peanuts, mucilage, and cultivator of garlic, hereby undertake, and hereby bind ourselves to take the chances that this same individual, the identical above named, E. S. McComas, shall appear and answer guilty or not guilty to said indictment, in whatever Court it may be prosecuted, persecuted or pressed, and shall at all times, day or night, render himself amenable to the legal orders and process of said Court, and if convicted of being guilty, or guilty of being convicted, shall appear personally, and not by proxy, and render himself in execution thereof, and shall appear for judgment, and if he shall fail to perform either of these conditions then, much as we may regret the same, we will pay to the State of Oregon, the same being one of the Confederation of States, known as the United States of America, of the Continent of North America, and of the western hemisphere, planet Earth, the sum of $100.00, in lawful or fiat money of said government, and this we do of our own free will and consent, just because we feel inclined to do so at this time.

In witness whereof, We have hereunto attached our names this 24th day of November, 1879.

(Signed) L. A. BLACKER,
L. REMILLARD.

Correspondence.

THE ATTITUDE OF THE TRIAL JUDGE.

To the Editor of LAW NOTES.

SIR: Your editorials are always interesting, and generally edifying, but it seems to me that your comments upon "The Steinheil Case" (January number, page 182) are obviously erroneous, if not absolutely hurtful. After criticising the disgraceful conduct of the French judge who tried the case in his efforts, by his scathing cross-examination, to force a confession of guilt from the woman on trial, you say: "It does not appear, however, that this procedure is inherently an outrage against humanity and justice, or likely to result in the conviction of the innocent. The judge simply performs the duties of the prosecuting attorney, and examines the accused very much as any prosecuting attorney would, when the defendant takes the witness stand. The facts brought out cannot be very much more damaging when elicited by the judge, than if elicited by some other officer of the court." Now, in the foregoing, do you not fall into the grave error of confining your thoughts to the testimony elicited, while ignoring the *source* of their elicitation? However wrong in theory, it is known to all habitués of trial courts that a prosecuting attorney (with exceedingly rare exceptions) uses all his talents and energies to convict any and every defendant arraigned for trial. Jurors understand this fully; whereas the judge is understood to "hold the scales of justice in equal poise" as between the State and the defendant. Speaking from observation as a practitioner and a judge, I know that jurors, as a rule, anxiously watch to catch, if possible, the judge's conclusion as to the merits of a case, and they are anxious to coincide with his views, both from confidence in his supposed better judgment, and from a desire to render verdicts which will meet his approval. If he is a judge of force and conviction, he can, if he will, exercise a controlling influence with the jury. Then how important it is for him to withhold from the jury his convictions upon the *facts*, if the line of demarcation between the functions of judge and jury is to be sacredly preserved! Insinuating and incriminating questions by a prosecuting attorney are expected by the jury, and are taken at their worth, and the jurors are not swayed by such implications of guilt; but let the same questions be put by the judge, and the jury at once jump to the conclusion that he sees strong evidences of guilt. It was never intended that a judge should exercise this influence to the prejudice of a litigant. I grant that it is necessary, at times, in the interest of justice, for a judge to elicit facts *omitted* by counsel, but even then it should be done in such way as not to give the jury the slightest clue as to his view of the facts. Whether in criminal cases or civil suits, the judge should sit in "unmoved impartiality," never forgetting that the judge and the jury have different and distinct functions, and that to overstep the boundary line between the two is an invasion of a sacred right.

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Law Notes

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An index to volume 13 *of* LAW NOTES, *which is completed by this number, is being prepared and will be sent free to subscribers on application to the publishers.*

Federal Corporations and Removal of Causes.

OUR national legislators must not overlook the necessity for a provision in the federal incorporation bill, or in a separate enactment, forbidding the removal of a cause from a State court to a federal Circuit Court solely on the ground that one of the parties is a federal corporation, and also depriving the Circuit Court of original jurisdiction on the same ground. In the absence of such a provision the federal courts will be overwhelmed by an avalanche of business, for a suit by or against a federal corporation raises *ipso facto* a federal question, and if the amount in controversy exceeds two thousand dollars the federal court has jurisdiction, both original and by removal. Whenever a personal injury action or any other suit is brought against a corporation in a State court, the defendant removes it to the federal court if possible, and diversity of citizenship is not necessary if a federal question is involved. Volume 90 of the Arkansas Reports alone contains twelve cases by or against the St. Louis, Iron Mountain and Southern Railway Company. Upon examination we find that at least six of these involved more than two thousand dollars, and almost without doubt would have been tried in the federal Circuit Court if the railway company, either as plaintiff or defendant, had been a federal corporation. As is well known, the Judiciary Act of 1887–1888 was designed to contract the jurisdiction of the federal courts, especially jurisdiction by removal, but the business of those courts will be intolerably augmented unless a preventive measure accompanies a federal incorporation act.

Federal Jurisdiction of Actions on Federal Employer's Liability Act.

IN *Nelson* v. *Southern R. Co.*, 172 Fed. Rep. 478, Judge Newman in the federal Circuit Court in Georgia held that a suit brought in a State court on the federal employer's liability act (Act of April 22, 1908, 35 St. L. 65, Fed. St. Ann. Supp. 548), the declaration containing no statement or suggestion that the result of the suit will depend upon the construction of the act, is not removable on the ground that it presents a federal question. But in *Cound* v. *Atchison, etc., R. Co.*, 173 Fed. Rep. 527, an action instituted in the federal Circuit Court on the same federal statute, Judge Maxey in the Texas district held that "the very subject-matter of the controversy is federal;" so that if his judgment is correct the federal Circuit Court has jurisdiction both original and by removal. This conflict of judicial opinion makes an unfortunate situation unless it is quickly remedied; for when the federal Circuit Court takes jurisdiction of a case by removal all the proceedings in that court or in the Circuit Court of Appeals — including trials, appointment of receivers, and expenses of receivership, decrees and judgments for costs, etc. — are absolutely void if the case is ultimately remanded to the State court because of erroneous assumption of jurisdiction by the federal court. It is to be hoped that the question of federal jurisdiction of ordinary actions on the employer's liability act will be speedily certified to the Supreme Court without going through the Circuit Court of Appeals.

Judicial "Scoring" of Jurors.

A FEW weeks ago a jury in the city of Brooklyn acquitted a man on trial for abduction, because, as they afterward told the newspaper reporters, they were not satisfied beyond a reasonable doubt that the prosecution had proved that the abducted girl was under the age of eighteen years, as the statute required. The judge thereupon expressed his surprise and disappointment at the action of the jury and dismissed them for the term. The prosecuting attorney said as the jury filed out: "Next time this man is tried I hope he will be tried by an American jury of some intelligence." But never mind what the attorney said. A word or two to the judge. Not long ago in a contested will case a Brooklyn surrogate said the testimony of the lawyer who drafted the will and testified for the proponent "is very remarkable" and "the only deduction is that he falsified for a purpose." *Matter of Duffy*, 51 N. Y. Misc. 543. The surrogate's decree refusing probate was reversed by the Appellate Division, and Mr. Justice Miller, speaking for the five justices, said they found nothing to discredit the witness and "we do not share the opinion of the learned surrogate" in that behalf. *In re Duffy's Will*, 127 N. Y. App. Div. 174, 111 N. Y. Supp. 491. In the Barbara Aub case, ten or a dozen years ago, wasn't the learned New York Recorder cocksure of the defendant's guilt? In *Brown* v. *Brown*, 62 N. J. Eq. 29, 49 Atl. Rep. 589, a divorce case, the vice-chancellor wrote an opinion which covers thirty-seven pages of the report, and upon an exhaustive review of the testimony adjudged a wife guilty of adultery and granted her husband a divorce. On appeal to the Court of Errors and Appeals the same evidence was discussed with consummate ability by Judge Vredenburgh, the

decree of the vice-chancellor was reversed, and the wife's name saved from dishonor. "Her reputation under the proofs stands without a stain or blemish upon it," was the unanimous opinion of the *fifteen* judges. *Brown* v. *Brown,* 63 N. J. Eq. 348, 50 Atl. Rep. 608. The same vice-chancellor also committed a grave error, in the opinion of the appellate court, when he adjudged a Roman Catholic priest a perjurer. *Pironi* v. *Corrigan,* 47 N. J. Eq. 135, 20 Atl. Rep. 218, *reversed Corrigan* v. *Pironi,* 48 N. J. Eq. 607, 23 Atl. Rep. 355. In *Myers* v. *Chicago, etc., R. Co.,* 95 Fed. Rep. 406, 414, 37 C. C. A. 137, Judge Caldwell, who had served nearly thirty-five years on the bench of the federal District and Circuit Courts, said that trial by jury was guaranteed in the Constitution "because the people knew the judges were poor judges of the facts" and that "every day's experience confirms the wisdom of their action." Equally strong testimony has been given by some of the greatest judges this country has ever known. We are aware that much can be said on the other side, and hope that we are not fanatical worshipers of jurors as judges of facts. But we are certain that a judge ought to speak from calm deliberation and without the faintest doubt when he allows himself to castigate twelve presumptively intelligent citizens as they file out of the jury box. It would be better for him to say nothing at all, at least in public. How many self-respecting men will condescend to serve willingly on juries, if they know the judge is likely to hold them up to public scorn because he disagrees with their unanimous opinion delivered under oath?

Some Observations by a Juryman.

IN the January number of *Scribner's Magazine* there is an interesting article by Joseph Hornor Coates on "Some Difficulties of a Juryman." The author seems not to be a member of the legal profession, and speaks from personal experience as a juror in some hundreds of trials in the State and federal courts, but the article bears ample internal evidence that he is a "near" lawyer. We excerpt a few passages from his very readable paper:

"Probably in the majority of cases it is the opinion of the judge, so far as the jurors can gather it from his charge, which makes the verdict of the jury. Speeches of attorneys for prosecution or defense carry little weight in the retirement of the jury room, so far as my observation goes; I remember only once that such a speech was mentioned in considering a verdict, and then a juryman arguing for the defendant criticised the man's own counsel! I have observed, however, that the charge of the judge is listened to with grave attention, and his opinion, if it is at all indicated in the charge, is frequently referred to in the jury room when the case is doubtful. . . . No judge in this country would dare to commit a jury for their verdict, though jurymen are sometimes afraid of it; but verdicts have been known to be received with scolding and abuse, and the offending jurors dismissed from further service in disgrace. Sometimes judges openly show their disagreement with the conclusions of the jury in a way that does not tend to enhance respect for the jury system. I once heard a judge call back to the bar of a court a man who had just been acquitted and tell him that he need not think he left that court room in the character of an innocent man, even though the jury had pronounced him not guilty. And in another case the judge ordered the acquitted man back into the custody of the court while he inquired of the district attorney whether there was no way in which he could be tried over again. I was not in the jury box in either of these cases, but from what I heard of the evidence it seemed to me both verdicts were just, and that it was not in good form to cast reflections upon them. . . . The question as to how a serious divergence of view in the jury room should be dealt with has presented much difficulty and has often been discussed. Experience in jury service does not seem to suggest any entirely satisfactory remedy; and in practice it seems impossible to avoid at times some degree of pressure upon the minority to get on with the business of the court and avoid unreasonable mistrials. . . . Where simple argument fails, persuasion, and often angry denunciation, usually brings the obstinate man to terms after awhile, and after he sees the one or two others who have at first stood with him gradually fall off. It is hard for one man to stand out permanently against eleven others who are locked up in the one room with him and clamoring to be let out. I have seen cases where the jury was at first evenly divided and where the first defection from one side was followed by an agreement of the whole. Some men never seem to have any firm settled conviction, but wait to see on which side preponderance lies. . . . Where a man is on trial for his life, or for any crime punishable by long imprisonment even, the strong conviction of innocence in the minds of several jurymen seems to me in itself often to raise the question of a reasonable doubt of guilt. For evidence in criminal trials is often of a character hard to weigh justly in arriving at a conclusion as to truth."

Dr. Eliot's Anti-strike and Anti-lockout Bill.

DR. CHARLES W. ELIOT, ex-president of Harvard University, George B. Hugo, and George H. Ellis have petitioned the Massachusetts legislature for "an act to provide for the public investigation of industrial disputes and for the prevention and settlement of strikes and lockouts." The first section of the bill says: "It shall be unlawful for any employer to declare or cause a lockout or for any employee to go on strike on account of any dispute provided for by this act, before such dispute shall have been referred to a board of investigation under the provisions of this act, or during such reference; but nothing in this act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein or for any cause not constituting a lockout or strike." Public service corporations are apparently excluded from the purview of the proposed act. At any rate, the term "lockout" would seem to be inapplicable to a railroad company. If the law is to provide a respite for employers in their contests with employees, why should private employers be preferred to *quasi*-public employers in the bestowal of the favor? The general public would be better accommodated by allowing a great railroad corporation time to collect an army of strike breakers than by giving the same aid to a textile manufacturer.

Section 2 of the bill states the subject-matter of various "disputes" that come within the provisions of the bill. Among these are "all matters relating to hours of employment, wages," etc. Provision is made for the appointment of a commissioner of labor to whom employer or employees may apply for the appointment of a board

of investigation, and in every such case, until the dispute has been finally dealt with by the board, neither the employer nor the employees affected shall alter the conditions of employment or the wages or hours, or on account of the dispute do or be concerned in doing directly or indirectly anything in the nature of a lockout or strike or a suspension or discontinuance of employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute or anything arising out of the dispute. The findings of the board are not binding on the parties unless the latter agree in writing, before or during the proceedings, to be bound thereby. Penalties are severe: An employer may be fined $10 a day for each employee unlawfully locked out, but not less than $100 for each day or part of a day that such lockout exists. An employee who unlawfully strikes may be fined $50 for every day of the strike. "Any employer or employee violating any other provision of this act shall be liable to a fine of not more than $1,000." Following this is a provision which we think Sir Thomas More could not have tolerated in Utopia, for after all he was a lawyer. It is this: "Any employer or employee using any provision of this act for the purpose of unjustly maintaining a given condition of affairs through delay shall be liable to a fine of not more than $1,000." That is, a man may be convicted and severely punished as a criminal for doing what a jury in the particular case, and uncontrolled by precedent, may determine to be "unjust"! Surely this so-called "law," if correctly administered, would require a divinely instructed Moses in every juror's seat. Anyhow, many employers of great bodies of workmen would cheerfully pay $1,000 for an efficient guaranty that their employees would preserve the *status quo* while the employer was diligently preparing himself for a threatened strike. The bill could not possibly be approved by labor unions. Imagine Japan agreeing not to declare war against Russia pending investigation of the alleged *casus belli* by the Hague tribunal, if in the meanwhile Russia was at liberty to despatch troops to Manchuria!

Constitutionality of Dr. Eliot's Proposed Legislation.

BUT Dr. Eliot's proposed act would be, in our opinion, plainly unconstitutional. In Massachusetts there is no question of the general right of a labor union to strike. In *Pickett* v. *Walsh,* 192 Mass. 572, 580, Mr. Justice Loring said: "The right of laborers to organize unions and to utilize such organizations by instituting a strike is an exercise of the common-law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit." In *Reynolds* v. *Davis,* 198 Mass. 294, 302, Chief Justice Knowlton said: "The most effectual way of enforcing the right of every member [of a labor union] to just treatment from his employer, in references to wages, hours of labor, and other things affecting his interests, is by withholding the labor of the union until justice is done." In *L. D. Willcutt & Sons Co.* v. *Driscoll,* 200 Mass. 110, 125, Mr. Justice Hammond said: "In many ways labor unions have succeeded in bettering the condition of the laborer; and so far as their ultimate intentions and the means used in accomplishing them are legal they are entitled to protection to the extreme limit of the law." The right to strike and to strike instantly, if deemed expedient, and in the absence of contractual restriction, is clearly a property right. Labor is simply a commodity, just like a horse or an inanimate subject of sale. Suppose the men who own most of the horses available for removing snow from a city's streets after a great storm decline, pursuant to agreement among themselves, to supply the city with horses in an emergency, thereby causing great loss and discomfort to citizens. Does any one suppose that their right to do so can be controlled or regulated by legislation without provision for compensation to be determined by an impartial tribunal? And if the owner's use of his horses cannot be thus taken, even temporarily for a public use, certainly there is no police power that could authorize the taking of men's labor, at any price, for *private* use until somebody notifies them that they are free men again. It may be exceedingly unneighborly and provocative of breaches of the peace for a landowner unnecessarily to build a structure shutting off his neighbor's view. But with limitations stated in *Rideout* v. *Knox,* 148 Mass. 372, it is his constitutional right to do so out of pure deviltry. In that case it was said: "It may be assumed that under our constitution the legislature would not have the power to prohibit putting up or maintaining stores or houses with malicious intent and thus to make a large part of the property of the commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owners. But it does not follow that the rule is the same for a boundary fence unnecessarily built more than six feet high." Arguing from analogy, it would seem that sympathetic strikes, so called, could be prohibited by legislation. But in Massachusetts they are already restrainable, perhaps even more effectually, by injunction, fortified by a threat of penalty to be inflicted by one man upon his own finding of guilt.

To compete for a public elective office is a constitutional right of an elector. The right may have a large money value. It is for the interest of the public that a candidate with superior qualifications shall not be defeated for capricious reasons. Could a legislature be persuaded to establish a board to pass upon the various arguments advanced in the campaign against a candidate, and determine (1) whether they are well founded in fact, and (2) whether they are logical or merely whimsical, and to forbid their use on the stump until those points are settled? The question answers itself; and we do not suppose that even a chancellor with an injunction as his "right arm" would dare to butt into an election campaign. But a proposal to interfere would be hardly less chimerical than Dr. Eliot's proposal to call a halt on labor unions until a board of high-brows, perchance, have inspected the situation.

Abolition of Insanity Defense in Criminal Cases.

A COMMITTEE of nine members of the New York State Bar Association reported to the association at its meeting in Rochester, in January, that in their opinion insanity as a defense in criminal cases should be abolished. The Thaw case was taken as a text for the report, and the committee in its report refers to the Thaw trial as "a disgraceful farce." The committee recommends the abolishment of the insanity defense in these words:

"Has not the time come in our system of penology to relegate to the realm of the obsolete the assumption that an insane man cannot commit crime? In other words, ought we not to abolish the defense of insanity and leave as the one issue to the petit

jury — did the accused do the forbidden act? If he did not he is innocent; if he did he is guilty; and with the state of his mind at that time the jury has nothing to do."

The report does not suggest that an insane man forfeit his life, but that he forfeit his liberty, holding that he is a dangerous man to society and that society should be protected against him, and that under no plea of insanity should he be allowed to walk from the court room free. The report also recommends a State lunacy commission to inquire into the defendant's state of mind when he seeks his freedom from a State institution to which he has been sent. These commissioners must first decide that the man is sane before he can go before any judge and ask for his freedom. The committee made this specific recommendation in regard to the Penal Code:

"'If these views be sound they could be put into effect with but little change of the statute law. Replace section 20 of the Penal Code by the following words: 'Insanity or other mental deficiency shall no longer be a defense against a charge of crime; nor shall it prevent a trial of the accused unless his mental condition is such as to satisfy the court upon its own inquiry that he is unable by reason thereof to make proper preparations for his defense.'"

Insanity Defense and the New York Penal Code.

THESE "experts," to wit, lawyers, thus subscribe to the opinion that "little change of the statute law" is required in order to exclude the testimony of those other and detestable "experts," the alienists, in aid of a defendant charged with crime. Let us see about that. By section 183 of the New York Penal Code one of the definitions of murder in the first degree is "the killing of a human being . . . from a deliberate and premeditated design to effect the death of the person killed." Is it possible that a general provision to be incorporated into section 20, that "insanity or other mental deficiency shall no longer be a defense against a charge of crime," *ex proprio vigore* endows an idiot with capacity to "deliberate" and "premeditate"? The requirement of deliberation and premeditation is not a mere proviso in section 183 but a part of the enacting clause, and the act denounced by that section cannot possibly be committed by an imbecile any more than by a person physically absent. Again, does the committee's proposed amendment of section 20 dispose of intoxication as a defense to the extent specified in section 22? Evidently the framers of the Penal Code, and consequently the legislature, did not regard intoxication as synonymous with any form of "insanity," for they were treated in separate sections. Does "other mental deficiency," in the strict construction of a penal statute derogatory of the common law, cover intoxication? We think not, for "idiocy" and "imbecility," mentioned in section 20 as it now stands, would probably be regarded as the "mental deficiency" intended. If we are correct and section 22 remains intact, then a defendant alleged to be an imbecile is to be deprived of the aid of expert testimony, while one who voluntarily became intoxicated may introduce medical specialists without limit. Of course there are many other offenses besides murder in the first degree — such as criminal libel — where a specific mental state is required not only at common law but by express language in the code, and it seems to us that the definitions of these offenses cannot be revised by simply amending section 20 as proposed.

Expert Opinion Evidence in General.

TESTIMONY of alienists in behalf of wealthy defendants on trial for murder is often disgusting enough to merit strong epithets in speaking of it. As a species of public indecency it may very properly be a subject for legislative attention. But we should be sorry to believe that the judgments of jurors are materially influenced by fantastic opinions of alienists or other medical experts, and that a brainstormist can actually swear common sense out of any court room. A well-known treatise on Legal Medicine has a chapter wherein its author, a medical expert, says: "When wounds of the neck are present, their direction should be carefully observed, also their extent and number. Suicidal wounds made by a right-handed person run from left to right, while homicidal wounds take the opposite direction." Can any one imagine that a jury would require very strong evidence to convince them that a wound running from left to right was inflicted by a defendant charged with homicide despite the expert's *ipse dixit* that "homicidal wounds take the opposite direction"? Still, jurors are perhaps more credulous than judges in estimating the value of expert testimony. For that reason, maybe, the Supreme Court of Iowa sanctions instructions to juries that expert (and nonexpert) opinion evidence to handwriting "is of the lowest order of evidence, or evidence of the most unsatisfactory character." *Whitaker* v. *Parker,* 42 Iowa 585, and later cases; *Jackson* v. *Adams,* 100 Iowa 163, 167, 69 N. W. Rep. 427. In deciding a motion in a patent infringement suit, in 1876, Sir George Jessel, Master of the Rolls, said: "Now, in the present instance I have, as usual, the evidence of experts on the one side and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained since I have had the honor of a seat on this bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert also honestly obtained. But the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half a dozen experts. I have known it in cases of valuation within my own experience at the bar. He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. I was told that by the solicitor in the cause. That is an extreme case, no doubt, but it may be done, and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect." *Thorn* v. *Worthing Skating Rink Co.,* L. R. 6 Ch. Div. 415, note at p. 416.

"SHALL we indict one man for making a fool of another?" Holt, C. J., *Reg.* v. *Jones,* (1703) 2 Raym. 1013.

New Method of Summoning Jurors and Witnesses.

HON. JAMES E. TOLBERT, district judge of the Seventeenth Judicial District in the State of Oklahoma, is sending a circular letter to members of the State legislature containing several suggestions in the public interest of which the following proposed innovation is the principal one:

> The courts of our State in summoning men for jury service and persons as witnesses, use the same process to notify them and bring them to court that was used by our English ancestors under the common law during the days of Blackstone, I therefore respectfully urge that you pass an act that will authorize the summoning of jurors and the subpœnaing of witnesses in the District, Superior, and County Courts of this State by notifying them of such service; the jurors — by personal oral notice, notice over the telephone, by telegraph, by mail, ordinary or registered, in the discretion of the judge of the court ordering the juries — and the witnesses — by personal oral notice, notice over the 'phone, by telegraph, by registered or ordinary mail, or by delivering to each person named in the subpœna a true copy of the subpœna, at the option of the party for whom the subpœna is issued.
>
> We use the same cumbersome machinery in the administration of the law that was used before the invention of the telephone and telegraph and the establishment of the United States mail. Under the conditions that exist now in this State, by means of the rural free delivery, telephone, etc., this service should be had for the public at a minimum expense. Why should the State, county, or a litigant be required to pay the peace officer mileage and a fee to go twenty miles into the country and notify a citizen that he is wanted to attend court when the same notice could be given by mail or over the 'phone at a very small cost?

We think Judge Tolbert's recommendation, as far as it concerns the summoning of jurors, should receive serious consideration. When notice is given by telephone perhaps it should be supplemented by notice through the mail, and the latter should be in all cases registered mail. Incessant actions in the southwest against the Western Union Telegraph Company for stupidity or laziness of operators in failing to deliver telegrams might justify an inference that this method of making important communications would not be sufficiently trustworthy. By the way, the New York Code of Civil Procedure provides for service by mail of notices and other papers in an action.

But would not the necessity of prepayment or tender of witness fees in civil cases be an insuperable obstacle to a provision for notice to witnesses by telephone, telegraph, or mail? Many witnesses would be unable to comply with notice unless they were provided with money for traveling expenses over the long distances, even within the borders of counties, that are shown on the map of the great State of Oklahoma. However, a duly authenticated waiver by telephone or telegraph would make the service satisfactory.

A Mathematical Poser.

IN *Birmingham Ry. L. & P. Co.* v. *Hayes,* 153 Ala. 178, 186, it was held that the trial court did not err in sustaining an objection to the following question addressed to a witness, presumably called as an expert: "How long does it take a car going from fifteen to twenty miles an hour to run twenty-five or thirty feet?" Judge Anderson said: "If this question is susceptible of a definite answer, the writer knows of no rule of mathematics by which a result can be obtained. One with such a knowledge of mathematics as should be possessed by the average juror can readily calculate how long it would take a car to run a lesser distance than a greater, when running both at the same rate of speed and both distances are definitely fixed. But how any one can give a definite answer to the foregoing question is beyond the comprehension of the court." But Judge Anderson's predecessors once succeeded very easily in dividing an odd number of persons by two without butchering any one. A statute provided that a single defendant on trial alone for a capital offense should be entitled to *twenty-one* peremptory challenges. In the next section of the act it was provided: "When two or more defendants are on trial jointly for a capital offense, or other felony, each defendant shall be entitled to *one-half* of the peremptory challenges allowed by this act." In *Gibson* v. *State,* 89 Ala. 121, two defendants were tried together and convicted of murder. One was allowed eleven peremptory challenges and the other only ten. "This was a compliance with the statute, as nearly as practicable," said Judge Somerville, "the personality of the jurors not being capable of enumeration by vulgar fractions." Well enough for the "eleven" culprit, but how about his unfortunate "ten" associate? If the latter were buying peanuts and an analogous difficulty arose we think the vender would have allowed him eleven. How could the trial judge know which of the two defendants before him the legislature intended to favor?

WHERE DO OUR COURTS GO FOR AUTHORITIES?

THE figures given in this article were obtained from the reporters' tables of cases cited in the following late or latest reports: 212 and 211 U. S.; 10 Ariz.; 90 Ark.; 153 Cal.; 81 and 80 Conn.; 15 Idaho; 241 Ill.; 17 Ind.; 139 Iowa; 121 La.; 103 and 102 Me.; 107 Md.; 202 and 201 Mass.; 156 and 153 Mich.; 215 and 214 Mo.; 37 and 36 Mont.; 74 and 73 N. H.; 72 and 71 N. J. Eq.; 76 and 75 N. J. L.; 193 and 192 N. Y.; 78 Ohio St.; 52 Oreg.; 224 and 223 Pa. St. (opinions of the Supreme Court, omitting opinions of the lower court); 28 R. I.; 120 and 119 Tenn.; 101 Tex.; 34 and 33 Utah; 81 Vt.; 108 Va.; 53 Wash.; 65 W. Va.; 138 Wis.; and 17 Wyo.

In most of the states not appearing in the foregoing list the reporter compiled a table only of citations from his own state, and occasionally neglected to do even that — a hookworm troubled poor Tom. Where we examined more than one report in a single jurisdiction our figures are the sum of all. And "Ill.," "Ind.," "N. Y.," etc., in the list of citations includes the reports of all of the courts in the jurisdiction named.

In LAW NOTES for August, 1901, we printed an article on "Reports and Citations" covering, among others, the topics embraced in the following compilation. The lapse of nine years seems not to have made any great difference in summaries from the citations. In some instances the percentage of outside cases cited in a given jurisdiction has apparently increased instead of diminished with the accumulation of reports in that jurisdiction. Perhaps if we had made an average from examination of a greater number of volumes of the latest reports the citation of outside cases would show a gradual falling off, as might reasonably be anticipated.

What American courts are deemed to be of the highest

authority? It is sometimes said that statistics are proverbial liars, the statement usually meaning that conclusions derived from them are unreliable because important factors are undiscerned or disregarded. Thus, the conspicuous influence of California cases in some of the western states is probably attributable in part to the fact that these states have borrowed one or more of the California codes or have very numerous mining and irrigation cases. But the following table unquestionably proves the supremacy of United States Supreme Court, Massachusetts, and New York cases. In a few jurisdictions the English citations are foremost. Is it a mere coincidence that most of the courts which cite them with greatest frequency are courts of exceptionally high repute? Here is a list of the various jurisdictions enumerated at the beginning of this article, the numbers in parentheses indicating the relative number of citations of courts outside of the jurisdiction, excluding those that are below "(7)":

U. S. (Sup. Ct.). — (1) Mass., (2) England, (3) N. Y., (4) Tex., (5) Ill. & Mich., (6) Ark., Dist. of Col., Ind., Kan., N. J., Va., and (7) Me.

Ariz. — (1) U. S. Sup. Ct., (2) Cal., (3) other federal courts, (4) N. Y., (5) Iowa, (6) N. C. and Tex., (7) Colo., Ind., Mass., Oreg., and W. Va.

Ark. — (1) U. S. Sup. Ct., (2) N. Y., (3) Mass., (4) Mo., (5) Ky., (6) other federal courts and Indiana, (7) Minn. and Pa.

Cal. — (1) U. S. Sup. Ct., (2) N. Y., (3) Ill., (4) Mass., (5) Mo., (6) other federal courts and Iowa, (7) Kan. and Mich.

Conn. — (1) U. S. Sup. Ct., (2) Mass., (3) N. Y., (4) Ill., (5) England, (6) other federal courts, (7) Vt.

Idaho. — (1) Cal., (2) lower federal courts, (3) N. Y. and U. S. Sup. Ct., (4) Oreg., (5) Utah and Wis., (6) Tex., (7) Ala., Iowa, and Wash.

Ill. — (1) Mass., (2) N. Y. and England, (3) U. S. Sup. Ct., (4) Ala., (5) Mo., (6) N. H., N. J., Ohio, Pa., and Tex., (7) Ind., Iowa, Md., N. Car., and Wis.

Ind. — (1) N. Y., (2) Mass., (3) U. S. Sup. Ct., (4) Ill., (5) Mo., (6) Iowa, (7) Pa.

Iowa. — (1) N. Y., (2) U. S. Sup. Ct., (3) Mass., (4) Ill., (5) Mich., (6) Pa., (7) Wis.

La. — (1) U. S. Sup. Ct., (2) Mo., (3) Tex., (4) Ala., (5) Cal., Ill., and Iowa, (6) Miss. and N. Y., (7) Ky.

Me. — (1) Mass., (2) U. S. Sup. Ct., (3) N. Y., (4) Mich. and N. H., (5) Ill. and England, (6) other federal courts, (7) Iowa and Pa.

Md. — (1) U. S. Sup. Ct., (2) England, (3) Pa., (4) N. Y., (5) other federal courts and Mass., (6) Me., Mo., N. H., Tex. and Wis., (7) Mich., N. J., and N. C.

Mass. — (1) England, (2) U. S. Sup. Ct., (3) N. Y., (4) other federal courts, (5) N. J., (6) Pa., (7) Ill., Mich., and Mo.

Mich. — (1) N. Y., (2) Mass., (3) U. S. Sup. Ct., (4) other federal courts, (5) Ill., (6) Pa., (7) England.

Mo. — (1) N. Y., (2) lower federal courts, (3) U. S. Sup. Ct., (4) Mass. and England, (5) Pa., (6) Tex., (7) Ill. and N. J.

Mont. — (1) Cal., (2) U. S. Sup. Ct., (3) N. Y., (4) other federal courts, (5) Minn., (6) Kan., (7) Colo., Iowa, and Mass.

Neb. — (1) U. S. Sup. Ct., (2) Ill., (3) Iowa, (4) Mich., (5) Mo., (6) Minn. and N. Y., (7) Ind., Ohio, and Wis.

N. H. — (1) Mass., (2) N. Y., (3) England, (4) U. S. Sup. Ct., (5) Pa., (6) N. J., (7) Conn.

N. J. Law. — (1) U. S. Sup. Ct., (2) N. Y., (3) Mass., (4) England, (5) Pa., (6) Ill., (7) other federal courts.

N. J. Eq. — (1) England, (2) N. Y., (3) U. S. Sup. Ct., (4) other federal courts, (5) Mass., (6) Pa., (7) Wis.

N. Y. — (1) England, (2) U. S. Sup. Ct., (3) Mass., (4) Cal. and N. J., (5) other federal courts and Ind., (6) Pa., (7) Ill.

Ohio. — (1) U. S. Sup. Ct., (2) Ill., (3) N. Y., (4) Mass., (5) England, (6) Kan., Mo., Pa., (7) N. Dak.

Oreg. — (1) U. S. Sup. Ct., (2) N. Y., (3) Ill., (4) Cal., (5) Pa., (6) other federal courts, (7) Tex.

Pa. — (1) U. S. Sup. Ct. and England, (2) N. Y., (3) other federal courts, (4) Mass. and Mich., (5) Conn. and Ohio, (6) Ky., Vt., and Wis., (7) various other States one for each.

R. I. — (1) Mass., (2) N. Y., (3) England, (4) U. S. Sup. Ct., (5) Pa., (6) other federal courts, Ill., Ind., and Wis., (7) Me. and Mich.

Tenn. — (1) U. S. Sup. Ct., (2) N. Y., (3) other federal courts, (4) Mass., (5) Pa., (6) Ill., (7) Mo. and England.

Tex. — (1) U. S. Sup. Ct., (2) N. Y., (3) Mass., (4) Ill., (5) Mo., (6) Mich., (7) other federal courts and Ala.

Utah. — (1) U. S. Sup. Ct., (2) Cal., (3) Ill., (4) N. Y., (5) Mo., (6) Mass., (7) Minn.

Vt. — (1) U. S. Sup. Ct., (2) Mass. and England, (3) N. Y., (4) Pa., (5) Ill., (6) Iowa and Me., (7) Ind. and N. J.

Va. — (1) U. S. Sup. Ct., (2) W. Va. and England, (3) N. Y., (4) Mass., (5) other federal courts, (6) Mo. and Pa., (7) Mich.

Wash. — (1) U. S. Sup. Ct., (2) N. Y., (3) Mass., (4) Cal. and Ill., (5) Ind., Mich., and Wis., (6) Iowa, (7) other federal courts, Kan., and Pa.

W. Va. — (1) Va., (2) U. S. Sup. Ct., (3) N. Y., (4) Pa., (5) England, (6) Iowa and Mass., (7) other federal courts.

Wis. — (1) N. Y., (2) U. S. Sup. Ct., (3) other federal courts, (4) N. J., (5) Mich., (6) Ill., (7) Iowa and Minn.

Wyo. — (1) N. Y., (2) Ind., (3) Ill., (4) U. S. Sup. Ct., (5) Cal., (6) Mo. and Wis., (7) Mass. and Tex.

"Mass." appears among the first seven everywhere except in Idaho, where it would be in (11), Louisiana and Nebraska, where it would be in (8), Oregon, where it would be in (11), and Wisconsin, where it would be in (9). Vermont is seventh in Connecticut, while the latter ranks lower than seven in Vermont. We had supposed a closer relationship existed between those two States, but Massachusetts citations occupy the second place in both of them. Indiana is far behind Illinois, the latter appearing in twenty-three of the jurisdictions here listed, the former in only eight. But Illinois has about twice as many Supreme Court and Appellate Court reports as Indiana. Virginia citations predominate of course in West Virginia, and the parent State reciprocates.

Taking the total number of citations — domestic, sister

value of the property at the time when the railroad was seeking to take it, or if it should happen to be a property without a market value, then the value would be ascertained under the other rules of law, and as the railroad must pay me a just compensation for my property without reference to whether that will net me a profit or leave me a loss, so when I come to take the railroad's service I must pay it — and it can only demand of me — a just compensation for that service no matter whether it is rendered at a profit or loss. Exactly as it was competent for me to prove or for the railroad to prove what my property had cost me, so it is competent for the railroad to prove or for me to prove what its property had cost the railroad company; but the cost of my property and the cost of the railroad's property are purely evidential, and are intended to aid us in fulfilling the constitutional requirement that the railroad shall pay me a just compensation for my property and that I shall pay the railroad a just compensation for its service.

Many who concede the technical correctness of this rule object to it upon the ground that it is almost impossible to apply it in practice. It is undoubtedly true that we cannot determine the value of a railroad service with the same certainty that we can measure cloth or weigh grain; but it is equally true that we cannot fix values and damages with absolute precision in any proceeding to condemn private property for a public use. I have participated in the trial of many condemnation cases, and I have seen honest men and good citizens differ widely in their testimony as to the value of the property actually taken and the damages to the remainder of the tract. I have seen one witness of high standing and absolute integrity place value and damages at double as much as another witness of equal character and standing would place them. In such cases I could well understand how badly perplexed the jury must have been in arriving at a verdict; but it never once entered my mind that we ought, on that account, to abrogate the rule which gives the owner the fair value of his property, and substitute, on account of simplicity, a rule giving him his original investment with a fair profit added to it. To reject the ancient and constitutional rule that guarantees all private property against being taken for a public use without a just compensation, and to accept this new and indefensible one of a fair profit on the investment because it is simpler and easier of application, is equivalent to saying that we will adopt an illegal and unconstitutional test for the purpose of relieving ourselves from the performance of a very tedious and somewhat difficult duty.

If those who are so ready to accept a wrong rule in order to escape the trouble of applying a right one will look a little deeper into this question they will find that in this case, as in all others, the violation of a sound legal and constitutional principle will lead us into difficulties rather than lead us out of them. I believe that I can demonstrate that the rule which we are asked to approve because it is a practicable one will produce almost endless confusion and injustice. It will permit the most palpable favoritism to some shippers, and the grossest injustice against others; it will invite a discrimination between communities and commodities; it cannot be equally and impartially applied to all railroads, and an attempt to do so would disorganize our entire railroad system, and bankrupt many railroad companies.

One serious vice of the rule which permits railroads to charge any rate necessary to earn a fair return on the value of their property is that it treats the whole schedule of railroad rates as a single question, and thus permits the favoritism, the injustice, and the discrimination which I mentioned a moment ago. If the railroad is entitled to earn a fair return on its property, then the test would be whether its receipts over and above its expenditures exceed that fair return, and it would not permit an inquiry into the reasonableness of each rate, because to do so would bring us back to the very problem of a just compensation for each particular service. It would, therefore, result that whenever any shipper challenged a particular rate the railroad could answer by showing that after deducting its expenses from its receipts the balance amounted to only a fair return on the value of its property. Will any intelligent man contend for a rule like that? Do you think the railroad could successfully answer my complaint that it was overcharging me by proving the value of its property, its expense, and its receipts, and thus showing that the difference between what it took in and paid out left it only a fair return on its investment? That might be entirely true; but it might be true because the railroad had charged some shippers less than they ought to have paid, and it could not excuse itself for charging me more than a just compensation for the service which it had rendered to me by showing that it had charged some one else less than a just compensation for the service which it had rendered to him. Let me state a concrete case.

Will any intelligent man say that the railroad could answer my complaint against excessive charges on my cattle which it carried from Texas to Chicago by showing that it had carried cattle from Wyoming to Chicago for half of what they ought to have paid? Such an answer would aggravate rather than excuse their conduct.

Not only would this rule permit discriminations as between shippers, but it would encourage discrimination between sections and communities. Let us suppose that one part of a railroad traversed a mineral region and another part an agricultural region. Would any man defend its action either as a matter of justice or as a matter of law, if it should impose a very high rate on the products of the farm and grant a very low rate on the mineral products of the mines? And yet, if all which the law requires is that the railroad shall have a fair return for the value of its property, it could defend itself in any court by showing that its net income aggregated only a fair return on its investment. What a mockery of law and justice it would be to permit the railroad to answer the farmer's complaint against the overcharges by proving undercharges against the miners, and thus establishing that the result of the combined charges brought the railroad only a fair return on its investment!

But the mischief would not stop with individual shippers or sections. It would disorganize and destroy our railroad system itself. Let us suppose that there were two parallel and competing lines serving practically the same territory, and in many cases exactly the same towns and cities. Let us suppose that one was constructed by wise and prudent men under the most favorable circumstances, and cost $60,000 per mile. Let us suppose that its competing line was built with equal judgment and economy, but being built years after the first, the cost of the right of way and terminals was necessarily much greater, and that owing to the character of the soil and the heavier grades the cost of the roadbed was also much greater, entailing an actual cost of $80,000 per mile. If these two roads are each entitled to earn a fair profit on their investment and to estimate that fair profit we will say at six per cent., the one road must earn $3,600 per mile each year, and the other must earn $4,800 per mile each year. Assuming that both are operated with equal economy and judgment, it must be obvious to any man that the first road can earn its annual charge of $3,600 per mile at a lower freight rate on a given tonnage than the other road must charge in order to earn its $4,800 per mile. Therefore, when you come to fix the rate so as to let each road earn its six per cent. you must fix a lower rate on the cheaper road, and a higher rate on the costlier road.

What would be the immediate and inevitable result of such

an arrangement? The traffic of that territory would instantly be diverted from one road to the other, and the rates would soon call for a readjustment. The cheaper road, on account of its increased volume of tonnage, would be earning more than six per cent. under the rate which had already been fixed, and the costlier road, in consequence of its diminished tonnage, would be earning less than its six per cent. Would you increase the rate on the costlier road, and reduce it on the cheaper one, increasing the income of the one and reducing the income of the other? You could not correct the inequality that way, because as you lowered the rate of the cheaper road, and raised the rate of the costlier road, you would divert still more tonnage from the second to the first, and it would soon become apparent that no law could make the earnings of each equal a fair return on the value of the property.

To notify the railroads that they can earn a fair return on their property and no more will destroy the incentive which moves railroad managers to build new lines and improve their old ones. If men who manage their railroads with skill and judgment can have no better profit than others who manage them without skill and judgment, we will soon reach a point where all progress in railroad management and development will cease, and that would be a disaster which I think no thoughtful man is willing to invite. I might examine this question in other aspects, but I have already trespassed too long upon your time and patience, and I trust that I have said enough to make it plain to these people who want a practical and workable rule that the rule which they propose is neither.

While I do not believe that the Supreme Court has yet found the true rule for measuring justice both to the people and to the railroads, I have never for one moment doubted that they will find it. That great tribunal has erred on more than one occasion, but it has sooner or later always realized and corrected its errors. It is this universal belief in its ultimate wisdom which has given it a character enjoyed by no other department of this government and approached by no other tribunal in the history of the world. It is now, as it has always been and always will be, the one place where the distinctions of caste and class disappear, and where the poor can meet the rich on a common level. The most powerful stand uncovered in its presence, and the weakest feel that it will always protect their rights. When discouraged by the violence of factions and the selfishness of demagogues, the patriot can always renew his faith in the permanency of this republic by remembering that the great and fundamental principle of human freedom as embodied in our constitution will be saved from every violation by its enlightened judgment.

But, my countrymen, safely as we may trust that court, I would not teach the people to rely on it alone for their security, and I would plead with them to understand that our perfect safety requires that we shall have wise and upright legislators to make the laws as well as wise and upright judges to construe them. If we would perpetuate these institutions in their purity and vigor, we must be governed by men who are wise enough to know what is right and brave enough to do it; by men who will consecrate their intellect and conscience to the public service, asking no higher reward for the sacrifice of their time and labor than the consciousness that they have contributed something towards preserving the independence of their country and promoting the happiness of their countrymen; by men who value justice above wealth and duty above popularity; by men whom the blandishments of the monopolist cannot seduce into doing wrong nor the threats of a walking delegate deter from doing right. With such men to make, to construe, and to enforce our laws, this republic, dedicated by our fathers to the proposition that we are capable of self-government, will fulfil the expectations of its founders, and become an example and an inspiration to all the world; and when this perfect work is done, the impartial historian must record that the lawyers of America have borne an honorable and a conspicuous part in it.

Cases of Interest.

COST OF KEEPING UP MONUMENT AND BURIAL PLOT AS FUNERAL EXPENSES. — In *In re* Maverick's Estate, 119 N. Y. S. 914, the New York Appellate Division, First Department, held that a moderate sum set apart to keep a decedent's burial plot and monument in repair and good order should be considered a part of the "burial expenses" and so exempt from the transfer tax on the estate. A bequest of $250 for this purpose was accordingly held exempt from the tax. McLaughlin, J., dissents.

RIGHT OF EMPLOYEE TO RECOVER FOR INJURIES SUSTAINED WHILE WORKING OVERTIME IN VIOLATION OF STATUTE. — A North Carolina statute provides that "any conductor, flagman, fireman, engineer, brakeman, or other member of any railroad train crew who shall work for any railroad company more than sixteen hours in any twenty-four hours shall be guilty of a misdemeanor." A locomotive fireman while working in violation of this statute was injured by the alleged negligence of the railroad company and brought his action for damages. The Supreme Court of North Carolina held (Lloyd *v.* North Carolina R. Co., 66 S. E. Rep. 604) that the violation of the statute was a complete defense to the action, although the plaintiff in working overtime was acting under the orders of his superior. Clark, J., dissents.

RIGHTS OF UNREGISTERED AUTOMOBILE ON CITY STREET — INJURY BY DEFECTIVE STREET. — In Hemming *v.* City of New Haven, 74 Atl. Rep. 892, the Connecticut Supreme Court of Errors holds that the failure of an automobile owner to comply with a statute requiring automobiles to be registered and numbered, and imposing a fine or imprisonment or both for failure to do so, does not defeat a recovery against a city for injuries caused by driving the machine into an excavation negligently left in a street. It is held that the statute does not make a traveler with an unregistered and unnumbered automobile a trespasser upon the street nor place his property outside of legal protection when injured by the unlawful act of another. This case is distinguished from a case in which there is a statutory prohibition against using in the streets or highways an unregistered or unmarked automobile.

WHAT AMOUNTS TO EMPLOYMENT OF CHILD AT WORK CONTRARY TO STATUTE. — Under a Massachusetts statute providing that "no child under the age of fourteen years shall be employed at work performed for wages or other compensation, to whomsoever payable, . . . after seven o'clock in the evening" the Supreme Judicial Court of that State holds in Commonwealth *v.* Griffith, 90 N. E. Rep. 394, that the word "work" as used in the statute is not limited to work done in a factory, workshop, or mercantile establishment, but includes a theatrical exhibition and the employment of children therein, and that a theatrical manager engaging a child in regular services in evening theatrical performances, thereby giving the child an opportunity for valuable training and the constant companionship of his parent who is an actor in the company, and without paying any other compensation for the services of the child, is guilty of employing the child in violation of the statute, the payment of wages as such not being a necessary element of employment.

RECOVERY FOR INJURIES SUSTAINED IN LIGHTING FIRE WITH KEROSENE. — In Peterson *v.* Standard Oil Co., 106 Pac. Rep. 337, the Supreme Court of Oregon sustained a judgment for damages for the death of the plaintiff's intestate caused by an explosion of kerosene with which the deceased was kindling a fire. The defendant had been guilty of a violation of a statute requiring the names and grades of such oils to be marked on the receptacles in which they were sold, and this the court held to be negligence *per se*. It was also held that the use of kerosene for lighting fires is not of itself contributory negligence. The complaint was held sufficient as against a general demurrer although it did not allege the dangerous character of the oil in question, the court taking judicial notice that such distillates are dangerous, and holding that the mentioning of the substance in the pleading was a sufficient allegation of its dangerous character.

RESPONSIBILITY OF LESSOR OF AUTOMOBILE FOR NEGLIGENCE OF CHAUFFEUR. — In Shepard *v.* Jacobs, 90 N. E. Rep. 392, the Supreme Judicial Court of Massachusetts held that where an automobile was leased for two days with a licensed chauffeur, and the control and management of the machine was not given up to the hirer, except that he could give orders to the chauffeur as to when and where the car should be driven, the chauffeur did not become the servant of the hirer but remained subject to the control of his general employer, so that the owner of the car and not the hirer was liable for a collision occurring through the chauffeur's negligence. The court thus applies to the hiring of an automobile with a chauffeur the rule that governs the hiring of a carriage with a driver. Reference is made to certain decisions holding that where the hirer of a railroad train or a large machine was to have control of it, the men in charge became his servants for whose negligence he was responsible as master, but the doctrine of the so-called carriage cases is held to be the one governing automobiles.

SUFFICIENCY OF ALLEGATIONS OF INJURY TO ADMIT PROOF OF DEAFNESS. — In Keefe *v.* Lee, 90 N. E. Rep. 344, the New York Court of Appeals holds that in an action for damages for personal injuries caused by the kick of a horse, allegations in the complaint that "said horse did viciously attack the plaintiff, jumping upon him, kicking him in the legs and feet, striking the plaintiff upon the head, breaking his skull, tearing the skin and scalp therefrom, wounding, injuring, and bruising his right leg and his body and nearly killing this plaintiff," and that "the plaintiff is seriously injured through his head, skull, eyes, and bruises to his right leg and body," were not sufficient to admit evidence that the injuries resulted in the deafness of the plaintiff, the inference being that the injuries to the head included only those specifically enumerated; and because of the admission of such evidence the judgment was reversed. The rule is stated to be that if a person seeks to recover damages other than such as necessarily, usually, and immediately flow from the injury, he must allege such special damages. Cullen, C. J., and Edward T. Bartlett and Willard Bartlett, JJ., dissent, being of the opinion that if any error was committed in the admission of the testimony as to deafness, it did not require a reversal of the judgment, the amount of which was quite small.

LIABILITY OF HUNTER FOR SHOOTING FELLOW HUNTER MISTAKEN FOR DEER. — In Rudd *v.* Byrnes, 105 Pac. Rep. 957, the Supreme Court of California reversed a judgment for the plaintiff in an action for damages for the negligent shooting of the plaintiff by the defendant while the two were on a deer hunt together. It appeared that they and another hunter were seeking the game on the banks of a river thickly grown with brush through which were deer crossings along which deer when chased by dogs would come into the water. It was agreed that the defendant should station himself two hundred yards above and the plaintiff two hundred yards below the third hunter in the party; but the plaintiff instead of doing this crossed the river and went above and opposite to the defendant, and the defendant, seeing a movement of the bushes caused by the plaintiff, and thinking it was a deer, fired and wounded the plaintiff. The trial court charged the jury that the plaintiff was entitled to a verdict and that the only question for them was the amount of damages. The Supreme Court held this to be error inasmuch as the evidence raised a question for the jury as to contributory negligence on the part of the plaintiff. As to the negligence of the defendant, it was held that he was guilty of a want of due care as a matter of law in that when he saw the movement of the underbrush he fired without taking time to discover whether the disturbance was caused by a deer or a human being.

RIGHT OF PAROLED PRISONER TO JUDICIAL HEARING ON QUESTION OF VIOLATION OF PAROLE. — In People *v.* Strassheim, 90 N. E. Rep. 118, the Supreme Court of Illinois had occasion to consider the right of a paroled prisoner to a hearing on the question of the violation of the terms of his parole, before reimprisonment. The statute authorized the board of pardons to establish regulations for paroling prisoners and provided that paroled prisoners should be considered in the custody of the warden of the penitentiary, subject to be reimprisoned at any time, and authorized the warden to reimprison any paroled prisoner, and required him to report to the board of pardons the return of such prisoner giving reasons therefor. The rules adopted by the board of pardons provided that a paroled prisoner must not leave his employment except by order of the warden and must report monthly to him showing various matters regarding his conduct and financial condition. The relator, a paroled prisoner whom the warden reimprisoned on the ground that he had violated his parole, brought habeas corpus for his release. It was held that the prisoner was not entitled to a judicial hearing on the question of the violation of his parole, but that he was entitled to a hearing before some lawfully constituted authority. It is decided, however, that the provision of the statute requiring the warden to report the reimprisonment of a paroled prisoner to the board of pardons, giving reasons therefor, authorizes a review of the action of the warden and is equivalent to a provision for a hearing. Vickers, J., dissents on the ground that the parole statute only requires the board of pardons to be notified of the reimprisonment of a paroled prisoner, and that this is no such hearing as due process of law requires.

LEGALITY OF CONTRACT TO AID WOMAN IN PROCURING HUSBAND. — In Wenninger *v.* Mitchell *et ux.*, 122 S. W. Rep. 1130, the Kansas City Court of Appeals was called upon to adjudicate the rights of the parties to a somewhat peculiar contract. The plaintiff, a woman, had formerly been very desirous of securing a husband and advertised for one in the newspapers, and in that way got into correspondence with a man to whom she quickly became engaged and shortly thereafter married. Now it appeared that the plaintiff had purchased an interest in a livery stable from the defendants — a man and wife — for the sum of five hundred dollars, and that while her courtship with her future husband was progressing, she agreed with the defendants that if they would help her get this man she would give up her interest in the stable for the service. After her marriage she brought suit in equity for an accounting with the defendants and claimed her interest in the livery stable. The services rendered by the defendants consisted mainly in writing two letters; but the defendants insisted that they performed another service in the following way: The prospective husband, who resided at Lincoln, Nebraska, started on the trip to the

plaintiff's home for the wedding, but before he got to the railroad station in Lincoln he was injured in a street car accident and notified the plaintiff of that fact. Not to be outdone, the plaintiff arranged to go to Lincoln and have the ceremony performed there, notwithstanding the accident, and invited the defendants to the wedding. The defendant, Mrs. Mitchell, accepted at once, but Mr. Mitchell gave evidence of some hesitation and only displayed a willingness to go after he learned that the plaintiff was to pay Mrs. Mitchell's expenses and was to make him a present of a new bedstead. His objections then softened and all three went to the wedding. The court said as to this feature of the case: "It is for thus attending the wedding that the additional service is made up. It is so out of the ordinary for one to charge for an acceptance of an invitation to a wedding that we find difficulty in allowing that it should be done in this instance. The record is silent as to any inconvenience to defendants. It does show that Mrs. Mitchell had never traveled much, and when we reflect on the pleasure it ordinarily must be to be favored with an invitation to a trip from a country village to a distant city to attend a wedding, and, as they said, partake of a 'wedding feast,' we are again loath to allow any charge in a proceeding in equity." As to the legal question in the suit the court held that the contract was illegal and unconscionable, and that as the plaintiff could not be deemed *in pari delicto*, she should be allowed to recover her share of the livery stable, which was the consideration paid.

VALIDITY OF KANSAS STATUTE TAXING CAPITAL STOCK OF FOREIGN CORPORATION. — In Western Union Telegraph Co. *v.* State of Kansas and The Pullman Co. *v.* State of Kansas, decided by the United States Supreme Court on January 17 and January 31 respectively, and not yet reported, it is held that the Kansas statute prescribing as a condition of the right of a foreign corporation to do domestic business in Kansas, that it shall pay for the benefit of the State school fund a charter fee "of one per cent. of its authorized capital upon the first one hundred thousand dollars of its capital stock or any part thereof; and upon the next four hundred thousand dollars or any part thereof, one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars," violates the interstate commerce and due process of law clauses of the Federal Constitution and for those reasons is invalid. The corporations involved in these cases were engaged in commerce among the various States of the Union, and their property was situated largely beyond the limits of the State of Kansas. Upon their refusal to pay the tax, proceedings were brought in the Kansas courts to oust them from the State so far as intrastate business was concerned, and the Supreme Court of Kansas rendered a judgment of ouster in each case. It was contended on behalf of the State that the statute was valid because it expressly disclaimed any purpose to obstruct or embarrass interstate commerce, but sought only to prevent the corporations from entering the field of domestic business in Kansas without conforming to the requirements of the statute. But this, in the opinion of the United States court, did not save the statute from invalidity. Mr. Justice Harlan, delivering the opinion of the court in the Western Union Telegraph Co. case, said: "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. . . . Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent. of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State. . . . Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent. of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business." The taxation of property beyond the limits of the State is held to take property without due process of law in violation of the constitution. The disposition of the Pullman Company case is governed largely by the opinion in the Telegraph Company case quoted above.

New Books.

INTERNATIONAL LAW.

International Law. By George Grafton Wilson, Ph.D., professor in Brown University, and George Fox Tucker, Ph. D., lately reporter of decisions of the Supreme Judicial Court of Massachusetts. Fifth Edition. Pp. xx + 505. New York. Silver, Burdett and Company. $2.50 net.

We have before us the fifth edition of Wilson and Tucker's International Law, an earlier edition of which was referred to by General Horace Porter, in a speech delivered at the Hague Conference of 1907, as a world authority on international law. The preface to the first edition is dated September, 1901, and in the short space of eight years five editions have been found necessary. This indicates the success with which the work has been received, and also no doubt the rapid development of international law since the publication of the first edition. In fact the authors in this fifth edition state in the preface that such development has made necessary an entire rewriting of many sections of the book. They say that the development of international law within the period since the call for the First Peace Conference at the Hague in 1898 has been greater than that during the two hundred and fifty years preceding, from the Peace of Westphalia in 1648 to the call for the Hague Conference in 1898. As to the authors of this book, we would like to say a few words. It seems that they have been careful to conceal what is a fact, that they have had much experience as teachers in international law. Thus Professor Wilson, while making it known on the title page that he is a professor at Brown University — and by the way we think he teaches social and political science at that institution — does not inform us that he has taught international law at the United States Naval War College since 1900. Mr. Tucker, too, is equally modest regarding any claim to recognition as an authority on international law apart from his writings on the subject, for while he is anxious to let it be known on the title page that he was

once a court reporter, he does not choose to inform his readers that he was also for many years a lecturer on international law at Boston University. However, we choose to let the public know what the authors have chosen to conceal, and we believe that the excellence of their production is due to their classroom experience. If the authors for some reason or other are really desirous of keeping from their readers any information regarding their qualifications as writers on international subjects we apologize for resorting to extraneous facts to disclose such qualifications.

The work is divided into the following different parts: General and Historical, Persons in International Law, International Law of Peace, International Law of War, and International Law of Neutrality. There are also fifteen appendices, a bibliography, and an index. The appendices contain the texts of numerous important treaties and conventions, together with instructions for the government of armies of the United States in the field, United States neutrality laws, procedure in prize courts, and a digest of important cases, arranged under titles. To show that the book deals with live topics it is only necessary to refer to the author's consideration of "Aërial Jurisdiction" in connection with a general treatment on jurisdiction. It may be remembered that Chief Justice Simeon Baldwin, of Connecticut, a professor at the Yale Law School, delivered an address not long ago on this very subject. Surely we are fast coming to the time when real, and not moot, cases on this subject will be before the different tribunals for determination. The mechanical features of the book are excellent. We believe this latest edition will be received by students of international law with the same degree of satisfaction as were earlier editions.

THEORY OF LAW.

General Theory of Law. By N. M. Korkunov, late professor of public law, University of St. Petersburg. English translation by W. G. Hastings, Dean of the Law Faculty, University of Nebraska. Pp. 524. Boston. The Boston Book Company. 1909.

We are told in the preface written by Dean Hastings, that in examining a Paris catalogue some years ago, he saw an advertisement of an International Library of Public Law and that the work selected on the subject of the General Theory of Law was that of a Russian writer of whom he had never heard. His curiosity was excited by reason of the fact that the French publishers went to Russia for a work on the theory of law, and he was led to buy the French translation. Later, thinking it desirable that there should be an English translation of this Russian work, he undertook its translation into English assisted by a Russian instructor at the University of Nebraska. Free use, he says, was made of the French version. The translation is smooth and well rendered and reflects credit on the translator, and the substance of the translation makes it certain that Dean Hastings made no mistake in thinking that the English-speaking public would welcome this work of an eminent Russian professor. The first Russian edition was published in 1887, and since that time there have been eight editions. The English translation is from the sixth edition published in 1904. The general heads of the table of contents are: Conceptions of Law, Objective and Subjective Sides of Law, Social Conditions of Legal Development, and Positive Law. Prof. Korkunov does not think and write like a Russian. He has the freedom of thought found in several other countries, but not in Russia. Thus he says in one part of his work: "The regular development of social life will be seriously fettered if conditions which are indispensable to it are sacrificed to the present hour, to that interest, for example, which offers to assure external order; as in stifling the manifestation of all ideas in order to restrain the propagation of dangerous ones, order might be re-established more readily, but society would long feel the disastrous consequences of suppressing freedom of speech and of the press." The dominant theory of Prof. Korkunov's book is that of popular sovereignty and a refutation of the dogma of the historical school that law is a development purely national.

Dean Hastings is of opinion that Prof. Korkunov has been most strongly drawn to English writers, but that his point of view is less individualistic.

The Boston Book Company are responsible for the general appearance of the book, and, as usual, they have done their work well.

EVOLUTION OF LAW.

The Evolution of Law. By Henry W. Scott, of the New York Bar. New York: The Borden Press Publishing Company. 1908.

This book purports to be "a historical review of the evolution of law, based upon the author's Commentaries on the Evolution of Law, following the thread from the earliest known history of mankind to the present era and times." It contains 165 pages, 110 of which are devoted to following the "thread," 10 to "Observations by the late Senator John J. Ingalls, on Law, Government, and Biography," which was lifted from the author's work on "Distinguished American Lawyers," and the remaining 45 to the table of contents, index, etc. Moreover, the print is large, and the margins on the pages are unusually wide. It is apparent, therefore, that if the purpose of the book is accomplished one has no excuse for being ignorant of the history of law and its evolution when he can, in an evening, almost memorize the contents of this little volume. Unfortunately it does not seem to us that the author has succeeded in doing what he started out to do. If he had stuck to his text he could hardly have hoped to enlighten his readers appreciably, on account of the size of the book. But he is constantly missing the "thread," and gives us nothing more than an ill-assorted mass of information, much of which has no place in a work on the evolution of law. For example, he devotes nearly four pages to the early life, manhood, death, and example of Demosthenes, and here it might be well to add that he disposes of Magna Charta in eight lines. We would like to commend the book, which the author says was the result of infinite research, but are really unable to do so.

News of the Profession.

THE COMMERCIAL LAW LEAGUE will hold its next annual conference at Hot Springs, Va., on August 1 to 5.

THE AMERICAN BAR ASSOCIATION will hold its annual meeting in Chattanooga on August 31 and September 1 and 2.

DEATH OF VIRGINIA JUDGE. — Hon. D. A. Grimsley, judge of the ninth Virginia circuit, died at his home in Culpeper on February 5 in the seventieth year of his age.

DISTINGUISHED SOUTH CAROLINIAN DEAD. — Hon. James Aldrich, ex-circuit judge and one of the most distinguished lawyers and citizens of South Carolina, died in Aiken, on January 23, aged fifty-nine.

THE DISTRICT OF COLUMBIA BAR ASSOCIATION held its annual meeting on January 11 and elected the following officers: president, Michael J. Colbert; vice-presidents, Benjamin S. Minor and Henry W. Sohon; secretary, Prescott Gatley; treasurer, Charles H. Cragin.

EX-JUDGE OF NORTH CAROLINA COURT DIES IN BALTIMORE. — Hon. James E. Shepherd, formerly a justice of the Supreme Court of North Carolina, died at a hospital in Baltimore on February 7, aged sixty-three. Since retiring from the bench Judge Shepherd had practised law in Raleigh. He was elected to the Supreme Court in 1888 and served one term.

MADE PHILIPPINE JUDGE. — Grant P. Trent, of Tennessee, a judge of the first instance in the Philippine Islands, was on February 8 appointed a justice of the Supreme Court of the Philippines, to succeed Justice Elliott, who has been made a member of the Philippine Commission.

FEDERAL JUDGE BRYANT DIES IN ST. LOUIS. — Judge D. E. Bryant, of the United States District Court for the Eastern District of Texas, died in a St. Louis hospital on February 5 of paralysis. Judge Bryant was born in Kentucky in 1849, but removed to Texas when a child. He was admitted to the bar in 1873, and in 1890 was appointed to the federal bench.

STATE BAR MEETINGS NOT REPORTED. — The annual meeting of the Oklahoma Bar Association was held in Oklahoma City on February 15, 16, and 17, and that of the Florida association in Tampa on February 23 and 24. Reports of these meetings were not received in time to be printed in this number but will be given in our next issue.

KNAPPEN SUCCEEDS LURTON. — On January 17 President Taft nominated United States District Judge Loyal E. Knappen, of Michigan, to succeed Judge Horace Lurton as judge of the United States Circuit Court, Sixth Circuit. Arthur C. Denison, of Michigan, was nominated to succeed Judge Knappen on the district bench.

DEATH OF ONTARIO JUDGE. — Hon. Thomas Hodgins, judge of the Admiralty Division of the Exchequer Court and Master in Ordinary of the Supreme Court in Ontario, died in Toronto on January 14, at the age of eighty-two. The vacancy in the office of Master in Ordinary has been filled by the appointment of Mr. George Oscar Alcora, K. C., of Picton, Ont.

JUSTICE EDWARD PATTERSON DEAD. — Hon. Edward Patterson, former presiding justice of the Appellate Division of the New York Supreme Court in New York city, died at his home there on January 28. Justice Patterson, who was seventy-one years old, retired from the bench at the beginning of the current year. He was first elected to the bench in 1886 and had served continuously from that time to the date of his retirement.

MONTREAL BAR'S SIXTIETH ANNUAL DINNER. — On February 3 the sixtieth annual banquet of the Montreal Bar Association was held at the Hotel Windsor with His Excellency Earl Grey, Governor-General, as the guest of honor. Among those present who represented the bar of the United States was Hon. Louis Stuyvesant Chandler, ex-lieutenant-governor of New York. The cream of the Canadian bench and bar attended the dinner.

DEATH OF JUDGE TRUAX. — Hon. Charles H. Truax, who on January 1 retired from the New York Supreme Court bench, died in New York city on January 14 of pneumonia. Judge Truax was a native of New York and was sixty-four years of age. He was admitted to the bar in 1869, and in 1880 was elected judge of the Superior Court of New York city. He was elected to the Supreme Court in 1895, and was regarded as one of the ablest members of the court.

CHANGES ON QUEBEC BENCH. — On January 11 Charles Archer, K. C., of Montreal, was appointed to fill the vacancy on the Quebec Superior Court bench caused by the death of the late Judge Curran. Judge Champagne, of Pontiac county, was transferred to Hull to take the place of the late Judge Rochon, and Hon. W. A. Weir, provincial treasurer, was appointed to take Judge Champagne's place in Pontiac.

PROMINENT BOSTONIAN DIES SUDDENLY. — Frank Dewey Allen, formerly United States district attorney for Massachusetts, died suddenly at his home in Boston on January 23 at the age of sixty. Mr. Allen was one of the most widely known members of the Massachusetts bar and was prominent in many ways in the life of Boston. He was appointed to the federal attorneyship in 1889 by President Harrison.

MADE TAX COMMISSIONER FOR NEW YORK CITY. — State Comptroller Williams has appointed Allen P. Hallett to be tax commissioner for New York city. Recently Mr. Hallett has been connected with the law firm of Rollins & Rollins. Formerly he was for a number of years a member of the editorial staff of the Edward Thompson Company, and numerous able articles from his pen are to be found in the second edition of the American and English Encyclopædia of Law — notably "Consideration" and "Fraudulent Sales and Conveyances."

VIRGINIA'S ATTORNEY-GENERAL SUED. — Judge Joseph Sanders, of Bluefield, W. Va., a former justice of the West Virginia Supreme Court, has started an action against Samuel W. Williams, attorney-general of Virginia, asking damages to the extent of $24,000 on account of injuries inflicted on him by Mr. Williams. In the course of a spirited argument in one of the West Virginia courts Mr. Williams emphasized one of his points by smiting the ex-jurist on the head with an inkstand.

THE ARIZONA BAR ASSOCIATION held its annual meeting in Phœnix on January 10 and elected the following officers: President, Le Roy Anderson, of Prescott; vice-president, Judge F. S. Nave, of Globe; secretary, Paul Burks, of Prescott; treasurer, Joseph H. Kibbey, of Phœnix. On the evening of January 12 the annual banquet was held. Judge Nave acted as toastmaster, and responses were made by Paul Burks, Justice E. W. Lewis, George D. Christy, L. H. Chambers, Paul R. Ingles, and P. W. O'Sullivan.

FEDERAL JUDGE THOMPSON, OF OHIO, DIES. — On January 26, Hon. Albert C. Thompson, judge of the United States District Court for the Southern District of Ohio, died in Cincinnati of pneumonia. Judge Thompson was born at Brookville, Pa., in 1842. At the outbreak of the Civil War he enlisted and quickly rose to the rank of captain, but was retired from active service by a wound received at the battle of Bull Run. Subsequently he moved to Ohio where he practiced law, and after serving part of a term as probate judge he was elected to Congress, serving in the Forty-ninth, Fiftieth, and Fifty-first Congresses. In 1898 he was appointed to the federal bench.

MADE DEAN OF NORTH CAROLINA LAW SCHOOL. — Lucius P. McGehee, recently associated with the New York law firm of Cravath, Henderson & De Gersdorff, has been appointed dean of the University of North Carolina law school to succeed the late Judge James C. McRae. Mr. McGehee was formerly associate editor of the American and English Encyclopædia of Law (2d ed.) and was for several years in charge of the editorial department of LAW NOTES. He is a man of wide scholarship and the highest ability, and the University of North Carolina is to be congratulated on securing his services.

INSTITUTE OF INTERNATIONAL LAW. — The next congress of the Institute of International Law will be held in Paris on March 28 at the French Ministry for Foreign Affairs. The Presidential Bureau is composed of Professor Lyon-Caen, dean of the Paris Law School, who is president; Professor I. E. Holland, vice-president; and Professor Alberic Rolin, of Ghent, secretary-general. It is announced that among those who are to take part in this congress are Lord Reay, Professor Westlake, Professor de Bar of Göttingen, MM. Beernaert and Descamps, the Belgian ministers, M. Lardy, the Swiss minister in Paris, Professor Catellani of Padua, and Professor Errera, Rector of the University of Brussels.

CONNECTICUT STATE BAR ASSOCIATION. — The annual meeting of the Connecticut State Bar Association was held in New Haven on February 7. At the business session papers were read by Edward M. Day, of Hartford, and Dean Henry Wade Rogers, of the Yale law school. The association adopted the code of ethics recommended by the American Bar Association. At the annual banquet in the evening the guests of honor were Hon. Simeon E. Baldwin, the retiring chief justice of the Connecticut Supreme Court, Hon. Frederick B. Hall, the new chief justice, and Hon. Silas A. Robinson, recently promoted to the Supreme Court bench. The new officers of the association are: President, George E. Hill, of Bridgeport; vice-president, Hadlai A. Hull, of New London; secretary and treasurer, James E. Wheeler, of New Haven.

DATES FOR STATE BAR MEETINGS. — The annual meeting of the South Dakota State Bar Association will be held in Sioux Falls on March 29, 30, and 31, with Justice Horace E. Deemer, of the Iowa Supreme Court, as the annual orator. The Louisiana Association will hold its meeting on May 20 and 21, at Red Stick. At the meeting of the Illinois State Bar Association, to be held at the Chicago Beach Hotel on June 23 and 24, the principal speaker will be Hon. George W. Wickersham, Attorney-General of the United States. The New Hampshire lawyers will hold their annual gathering at the Hotel Wentworth, Newcastle, on June 25, with Hon. Alton B. Parker as the principal speaker. On June 28, 29, and 30 the meeting of the North Carolinians will be held at Wrightsville Beach, and on the same dates the Pennsylvania attorneys will meet at Cape May. On July 6, 7, and 8 the Ohio State Bar Association will hold its meeting at Cedar Point, with Senator Joseph W. Bailey delivering the annual address.

KANSAS STATE BAR ASSOCIATION. — The twenty-seventh annual meeting of the Kansas State Bar Association was held in Topeka on February 27 and 28. The president, Dean J. W. Green, of the Kansas University Law School, was in the chair and delivered an address on "The Three Departments of Government." The annual address was delivered by Dean Roscoe Pound, of the Chicago University law school, whose subject was "Puritanism and the Common Law." Other papers were "Criticism of Courts by Lawyers and Laymen," by W. S. Fitzpatrick, of Independence; "Our Probate Courts," by R. M. Anderson, of Beloit; "The Local Bar Association," by Paul Brown, of Wichita; "One Remedy for the Waste in Litigation between Master and Servant," by Maurice L. Alden, of Kansas City. A general discussion on the new Civil Code was led by I. O. Pickering, of Olathe. The meeting was concluded with the usual banquet. The following are the newly elected officers: President, C. A. Smart, of Ottawa; vice-president, W. E. Hutchinson, of Garden City; secretary, D. A. Valentine, of Clay Center; treasurer, J. G. Slouecker, of Topeka.

SOUTH CAROLINA STATE BAR ASSOCIATION. — The seventeenth annual meeting of the South Carolina State Bar Association was held in Columbia on January 20 and 21. The annual address was delivered by Hon. Hannis Taylor, former minister to Spain, whose subject was "English and Roman Law as World Systems." On the evening of the second day the annual banquet was held. Those who responded to toasts were Governor M. F. Ansel, Hannis Taylor, Hon. P. A. Wilcox, Hon. W. G. Sirrine, John J. McMahon, J. P. Carey, and M. L. Bonham. The following officers were elected: President, M. L. Bonham, of Anderson; vice-presidents, B. Hart Moss, of Orangeburg, George H. Bates, of Barnwell, Thomas G. McLeod, of Bishopville, W. F. Dargan, of Darlington, P. H. Nelson, of Columbia, A. L. Gaston, of Chester, Stobo J. Simpson, of Spartanburg, Walter H. Hunt, of Newberry, J. P. K. Boyan, of Charleston, William G. Sirrine, of Greenville, B. W. Crouch, of Saluda, and J. P. McNeill, of Florence; secretary, John J. Earle, of Columbia; treasurer, W. S. Nelson, of Columbia.

NEW YORK STATE BAR ASSOCIATION. — The thirty-third annual meeting of the New York State Bar Association was held in Rochester on January 20 and 21, with President Adelbert Moot, of Buffalo, presiding. The important features of the first day were a paper on "The Necessity for a Court of Criminal Appeal," by John D. Lindsay, of New York city, which was read by Judge F. M. Danaher, of Albany, Mr. Lindsay being unable to attend; the president's address on "Bar Association Ideals," and a paper by Simon Fleischner, of Buffalo, on "The Dishonesty of Sovereigns." In the evening the annual address was delivered by United States Senator Joseph W. Bailey, of Texas, whose subject was "The Power to Regulate Transportation Charges by Statutory Enactment." On the second day a paper on "Law in the Philippines" was read by Hon. James F. Tracy, of the Albany bar, formerly associate justice of the Philippine Supreme Court, and one on "The Employer's Liability Act" was read by Miss Cristal Eastman, of New York. The most-talked-of incident of the meeting was the report of the committee on the commitment and discharge of the criminal insane, recommending the abolition of the insanity defense and the limitation of the right to the writ of habeas corpus. At the banquet held in the evening at the Genesee Valley Club, retiring President Moot presided, and among those who responded to toasts were Judge Riddell, of Toronto; Senator Elihu Root, John G. Milburn, Congressman James Breck Perkins, Henry A. Eastbrook, of New York city, and Herbert A. Mowatt, of Toronto. The following officers were elected for the ensuing term: President, Elihu Root; vice-presidents, William D. Guthrie, Edward M. Shepard, James Fenimore Cooper, Thomas Spratt, Charles A. Miller, Israel T. Deyo, Edward Harris, J. Mahew Wainwright; secretary, Frederick E. Wadhams; treasurer, Albert Hessberg. The association will meet next year in Syracuse.

English Notes.

ANNUAL MEETING OF THE BAR. — The annual general meeting of the barristers was held in Lincoln's Inn on January 19, with Sir Edward Clarke, K. C., presiding. As usual there was nothing to interest any one except the barristers themselves and very little to interest them.

FAMOUS SOLICITOR RETIRES FROM PRACTICE. — Announcement has been made of the retirement from practice of Sir George H. Lewis, the most widely known solicitor in England. The *Law Journal* said of him editorially: "Probably no solicitor has ever succeeded in making his name so familiar to the public as Sir George Lewis has done during the half century and more he has been in practice."

LAWYERS IN HOUSE OF COMMONS. — The complete returns from the recent general elections in England show that in the new House of Commons the legal profession will, as usual, predominate. Out of a total of something over six hundred members 237 are lawyers. Next in numbers come the retired army officers with a total of 118. Professional literary men come in a poor third with only forty-five.

NO MORE KISSING THE BOOK. — On January 1 the act abolishing the practice of "kissing the book" went into effect in England, and since then the courts appear to have found considerable difficulty in accommodating themselves to the change. Some of the judges apparently regard it as a most scandalous innovation, likely in the end to bring about the downfall of the

British Empire. Perhaps the most unique criticism is one recently put forward by Mr. Justice Darling, who pointed out that under the old system the microbes that infested the holy book dispensed justice to many perjurers who would otherwise have escaped punishment.

A HUMOROUS JUDGE. — The English are wont to speak somewhat boastfully of the freedom of their judiciary from political entanglements, but if one may judge by a recent political speech made by Judge Rentoul, K. C., of the City of London Court, their judiciary mingles rather more freely with the politicians than does our own. Addressing an audience of workingmen at Paddington in support of one of the candidates, Judge Rentoul said: "I hope to see you all again — somewhere — [laughter] — and I want to give you all a word of earnest advice. When you are in the dock at the Old Bailey, [laughter] don't pretend to know me, but pass up a note bearing the words 'North Paddington,' and I will do the best I can for you." [Loud laughter and cheers.]

RIGHT OF LIFE TENANT TO DIVIDEND. — That a life tenant is not entitled to any part of a dividend which has accrued due before, but is not paid till after the stock has been purchased with funds of the estate, was held recently by Mr. Justice Warrington in *In re* Peel's Settled Estates, noted in the *Law Journal* for January 22, at page 54. Contrary to the American custom of selling stocks "ex-dividend" as soon as the dividend is declared, it appears to be the practice in England to purchase "cum dividend," the purchaser being entitled to receive the dividend when paid. In this case the stock was purchased on July 29 and the dividend was not payable until August 11, but it was held that, as the amount of the dividend had been ascertained at the time of the purchase, all of it went to the *corpus* of the estate and the life tenant was entitled to none of it.

DEFENSE OF SELF AGAINST IRATE HUSBAND. — The right of a gentleman who browses in another's pasture to defend himself against the onslaught of the wronged husband was under consideration recently by the Court of Criminal Appeal in the case of Rex *v.* Morse. The appellant had been convicted of unlawfully wounding the husband of a lady with whom he had sustained meretricious relations. The husband, it seems, had grown quite indignant over the appellant's behavior and had set upon him with such violence as to warrant reasonable measures for self protection. But the jury thought the appellant had gone entirely too far when he added injury to insult by slicing the aggrieved husband with a razor, and the Court of Criminal Appeal, concurring in that view, sustained the conviction. Therefore, it would seem that, while the right of self-defense is not wholly denied to a gentleman who finds himself in such an embarrassing situation, his safest course is to follow the time-honored practice of hasty and unostentatious flight.

THE DOWNTRODDEN SUFFRAGETTES. — So far the English courts have not lent much encouragement to the militant Suffragettes. As noticed in this column heretofore, it has been decided that prison officials are entitled to feed the ladies forcibly when their strenuosity lands them in jail and they endeavor to secure their liberation by refusing to eat. In a recent case it has been decided that the cherished right to assemble peaceably and petition for redress of wrongs does not entitle the fair ones to block traffic by gathering in force before the residence of the Prime Minister and refusing to "move on" when requested so to do by the police. The defendants in this case were convicted of obstructing the police in the execution of their duty, and the conviction was affirmed. On the occasion when the arrests were made groups of members of the Women's Freedom League hung around the Prime Minister's house till after midnight and, when he finally put in an appearance, tried to hand him something in a tube. The Prime Minister, however, was evidently not very "keen" about receiving anything in a tube from the Suffragettes, and the trouble followed.

ACCIDENT INSURANCE — EXPOSURE TO UNNECESSARY DANGER. — A questionable judgment as to what constitutes "the wilful or negligent exposure of the assured to unnecessary danger or peril" was recently rendered by Mr. Justice Bray in the case of Walker *v.* Railway Passengers' Ins. Co., noted in the *Law Journal* for January 29, at p. 67. The deceased was walking on a windy day on the cliffs near Dover looking for wild orchids. He was seen a few yards from the edge of the cliff stooping as if looking for flowers, and later his body was found at the foot of the cliff, which at that point was almost perpendicular. This was all the evidence, and the defendant insurance company did not dispute that the assured came to his death by accident or that the burden was on it to show that the accident was caused by his negligently exposing himself to unnecessary danger. Nevertheless Mr. Justice Bray upheld the report of an arbitrator finding that the deceased lost his life by doing an act which an ordinarily prudent man would not have done. The editor of the *Law Journal* criticises the decision as setting up "a cowardly standard of prudence," which is not good either for an individual or a community. It does seem a bit far-fetched to maintain that an ordinarily prudent man would not go within "a few yards" of the edge of a cliff.

THE LAW'S DELAY IN ENGLAND. — Judging from the amount of attention now being given the subject of the law's delay by the English legal periodicals, the question would seem to be almost, if not quite, as important over there as it is in the United States. In the King's Bench especially the judges are falling further behind with their work every year, and it is becoming apparent that something must be done before long. The most obvious remedy, that of appointing additional judges, has recently been recommended by a joint committee of the Lords and Commons, but it takes a long time for England to make up its mind to so momentous a step. Another proposed remedy is to shorten the Long Vacation by twelve days, which would give the equivalent of one additional judge's work throughout the year without imposing any new burden on the public treasury. Still another plea under consideration is the reform of the circuit system so that not so much of the judges' time will be wasted in journeys to places where there is little or no court business to be dispatched. Doubtless some remedial action will be taken eventually, as was the case in 1907, when an appointment of two additional judges was made only to be neutralized almost at once by the establishment of the Court of Criminal Appeal. Meanwhile there are many and bitter complaints over the tardy administration of justice in the King's Bench Division.

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Obiter Dicta.

THE PERILOUS METAPHOR. — In People *v.* Price, (Cal.) 98 Pac. 547, the court said: "The weight of Perry could have thrown but little light upon a matter which was not the main issue in the case."

OUT OF THE ORDINARY.— In Racey *v.* Racey, 12 Okla. 650, the court remarks that "a decree of divorce, as a manifestation of love and affection, is certainly putting the document to a different use than is customary."

A GOOD TIME TO WALK. — "We know nothing more apt to endanger life and safety than to place in control of a passenger street car the combination of a dangerous character, a conductor loaded with whiskey, and a pistol loaded with powder and ball." Lumpkin, J., in Savannah Elec. Co. *v.* Wheeler, 128 Ga. 550.

EXPERT TESTIMONY. — In Matter of City of New York, 120 N. Y. App. Div. 700, which involved the value of a leasehold, "the expert for the tenant estimated the unexpired term of the leasehold interest . . . at $130,662.03," while "the expert called for the lessors testified that the market value of these leases if offered for sale would be about $3,500."

AN INADVERTENCE. — A lady who had testified in a lawsuit in Massachusetts created something of a sensation by subsequently rising and asking the judge if she might correct an error in her testimony. Being granted permission, she stated that, at the time she was asked what her age was, she was so flustered that she gave her bust measurement by mistake.

WASTED EFFORT. — As every lawyer knows, or, at least, ought to know, Senator Daniel, of Virginia, is the author of a standard work on negotiable instruments, which, by the way, is characterized by about the most elegant literary style to be found in any law book. On one occasion a friend inquired of the Senator how he came to write the book. "Well," he replied, "it was this way. Somebody asked me whether a sight draft bore interest, and I couldn't tell him. I was so ashamed of my ignorance that I determined to master the question at once, and from my study on this point I got the idea of writing a book on the subject." "Well, Senator," asked the friend, "does a sight draft bear interest?" Senator Daniel reflected for some moments and then replied, "Blamed if I haven't forgotten."

BREAKERS AHEAD FOR PITTSBURG HUSBANDS. — There are parlous times ahead for the married men of Pittsburg if a ruling of Judge Josiah Cohen in a divorce case recently tried there is upheld. The plaintiff, Mrs. Rosina Pasetti, tearfully testified that her husband remained away from home for two days and nights and on his return refused to tell her where he had been or what he had been doing. "He would not tell you anything?" said Judge Cohen. "In that case it is not necessary for you, madam, to testify to what you learned of his conduct during his absence. It was his plain duty to acquit himself from your just and natural suspicions. Judgment for the plaintiff." Unless Pittsburg has been grossly maligned, a considerable amount of explaining is now in order.

THE MAXIMS OF GRUBER. — At the annual dinner of the Queens County Bar Association held during January at the Hotel Astor in New York city, Mr. Abraham Gruber, in the course of an address, delivered himself of the following maxims:

"A client in Manhattan is worth two in Bushwick."

"Do unto your client as you would have your client do unto you; but make him pay for it."

"Every client has a silver lining."

"Some judges are born famous, some acquire fame, and some appoint condemnation proceedings."

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"When a judge of the Supreme Court says it looks like rain, get your umbrella; it probably will not rain, but some day you may want a reference."

"There are three kinds of lawyers, but the others are just as bad."

HE KNEW THE RULES OF EVIDENCE. — In a proceeding of forcible detainer in the court of a Kentucky justice of the peace, the landlord was represented by a dyspeptic and irascible old lawyer, while for the refractory tenant appeared a resourceful young attorney who was rather more than suspected of shystering proclivities. The trial was by jury. In offering his evidence the landlord's counsel began to read some deeds. "Never mind about taking time to read your papers," said the young lawyer, "I will agree that they shall be considered read." Later, when, in the course of his argument to the jury, the old fellow started to read from the admitted documents, his adversary promptly objected. "On what ground do you object, sir?" testily inquired the dyspeptic one. "On the ground, sir," gravely replied the other, "that they have already been considered as read." "That's right," said the alert justice with a reproachful look at the astonished attorney, "I remember it was agreed that them papers was to be considered read, and tharfore the co't won't allow 'em to be read again."

NOT WORTH IT. — The following letter was received by an Alabama attorney who had informed the writer thereof that it would cost her $25 to secure a divorce from her husband:

"I received your letter about my divorce I think $25.00 is to much as I have been married to Dock twelve years. and he was not no husband to me the whole time I had him he deseterd me for another woman I worked hard for him and he did not give me nothing he was no serves to me at all he would beat me. And Vulprate me on the highway at any time and I was every thing but a lady to him I tried all I could to stay with him. and I have asked him for my divorce and I havent had no reply and every body know I tried to be a wife to him white and black and I do think $25.00 is to much for such a sorry man if I cant get it no cheaper than that I will hafter to see farther From Hattie Watkins. My number is 307 St phillip. St."

A DANGEROUS CHARACTER. — The following is a copy of a complaint filed in the court of a justice of the peace at Norfolk, Neb.:

COMPLAINT.

State of Nebraska, Madison County, ss:

Martin H. Brand makes complaint in writing and upon oath before me, Herman Gereke, a Justice of the Peace in and for Madison County, and deposes and says: That he has just cause to fear, and does fear, that Levi Eddy, of said County will unlawfully, maliciously and willfully, do him great bodily injury, That the said Levi Eddy has assaulted him armed with a hammer, uttering dire and terrible threats, using vile and profane language, breaking the commandments, and offering and threatening to use the immage of his maker, the body of him the aforesaid Martin Brand, in the same manner.

Deponent believes from the ease and facility with which Levi Eddy breaks the commandments, that the, the said Martin H. Brand is in deadly danger of life and limb, and wishing to linger for a little while on the Western Hemisphere, invokes the aid of the LAW.

That the aforesaid Levi Eddy is a violent and dangerous man, who, not having the fear of God in his heart, and utterly regardless of social duties, arms himself with a cavalry saber (which he won not in the defense of his country, but in a raffle in the state of Indiana), and with the aforesaid mentioned saber in his hand, moves through the neighborhood, threatening death and destruction to them who oppose his lordly will.

W. H. Brand.

Subscribed in my presence and sworn to before me this 5th day of April, 1892.

Herman Gereck,
Justice of the Peace.

AN ISSUE AS TO HOSPITALITY. — The case of Scott *v.* Moore, 47 Neb. 346, was an action for the rescission of an assignment of a contract for the purchase of land on the ground of false representations by the defendant. The controlling issue was the question whether the defendant ever made such representations, but the pleadings were chiefly devoted to certain hospitality extended the defendant by the plaintiff. The answer stated that at the time when the representations were alleged to have been made the defendant was in Kearney attending court, and that "while so in attendance upon said court, said plaintiff, through the kindness of his heart, and realizing that this defendant was a stranger in that part of God's heritage, kindly took this defendant in, and gave him meat and drink; that this defendant was then wholly unacquainted with the ways that are dark and the tricks that are vain on the part of said plaintiff, partook of his hospitality, being captivated by his blandishments and pretexts of friendship for the stranger." To this the plaintiff replied, admitting "that part of the answer where the defendant alleges that he was given meat and drink by this plaintiff; and this plaintiff alleges that it was the most expensive meat and drink he ever dealt out to friend or foe; that relying upon the former friendship existing between this defendant and plaintiff, and not realizing that he was a wolf in lamb's clothing, and supposing that he was a friend, this plaintiff invited him into his home, and sat down with him in his parlor, and introduced him to his family, and that many a time since he has had reason to repent in sackcloth and ashes that he ever proffered said act of friendship and kindness; that the said defendant sat at his table, broke his bread, and ate his salt, and drank of his wine, and smoked his Havana cigars." The court apparently acquitted the defendant of ingratitude, for a judgment in his favor was affirmed.

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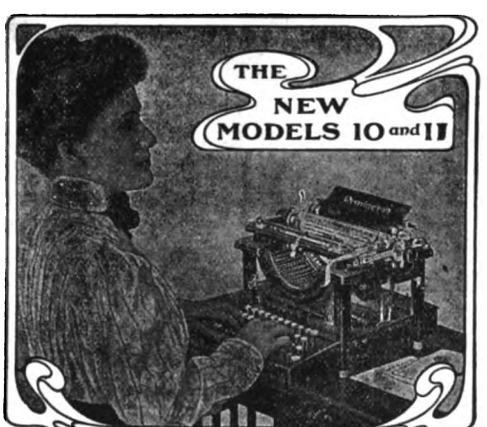

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